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No. 99-1571

IN THE

Supreme Court of the United States

TRAFFIX DEVICES, INCORPORATED,
Petitioner,

v.

MARKETING DISPLAYS, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX
(Volume I of II)

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PETITION FOR CERTIORARI FILED MARCH 27, 2000
CERTIORARI GRANTED JUNE 26, 2000

354 pp

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The appendix to the petition for certiorari contains the following material which is omitted from the Joint Appendix:

Appendix A:

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Appendix B:

Opinion and Order of the District Court, dated June 12, 1997 ..... 25a

Appendix C:

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Appendix D:

Opinion and Order of the District Court, dated June 2, 1997 ..... 68a

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-1148

MARKETING DISPLAYS, INCORPORATED
Plaintiff-Appellee
Cross-Appellant,

v.

TRAFFIX DEVICES, INCORPORATED
Defendant-Appellant
Cross-Appellee.

DOCKET ENTRIES

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2/11/97	Civil Case Docketed. Notice filed by counsel for appellant Traffix Devices. Transcript needed: n (stb) [97-1148]
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2/8/99	Corrected fourth proof brief filed by John S. Artz and John A. Artz (lead). Copies: 1. Certificate of Service date 2/5/99. Number of pages: 25. [97-1148, 97-2096, 97-2097] (THIS PROOF BRIEF REPLACES PROOF BRIEF FILED 1/22/99) (eim) [97-1148 97-2096 97-2097]
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12/29/99	OPINION filed : AFFIRMED in part REVERSED in part and REMANDED for further proceedings. Decision for publication pursuant to local rule 206. [97-1148, 97-2096, 97-2097] Danny J. Boggs,

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2/28/00	Record acknowledgment received from the district court. Acknowledged by: Durene Woret. Acknowledgment date: 02/17/00. [97-1148] (j c) [97-1148]
4/10/00	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Cross-Appellee Traffix Devices . Filed in the Supreme Court on 03-27-00 , Supreme Ct. case number: 99-1571 . [97-1148] (swh) [97-1148]. (swh) [97-1148]
7/6/00	U.S. Supreme Court letter filed granting petition for writ of certiorari [2131454-1] filed by TrafFix Devices [97-1148] Filed in the Supreme Court on 06-26-00. (swh) [97-1148]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-2096

MARKETING DISPLAYS, INCORPORATED
Plaintiff-Appellee
Cross-Appellant,

v.

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Defendant-Appellant
Cross-Appellee.

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1/22/99	BRIEFING LETTER SENT requesting brief corrections from John S. Artz and John A. Artz (Lead) because footnotes type is too small, must be same size as text of brief. Corrections due: 2/10/99. Resetting cross appeal briefing schedule: appendix due 2/18/99; first final brief now due 3/11/99; second final brief now due

	3/11/99; third final brief now due 3/11/99; fourth final brief now due 3/11/99 . (eim) [97-1148 97-2096 97-2097]
2/8/99	Corrected fourth proof brief filed by John S. Artz and John A. Artz (lead). Copies: 1. Certificate of Service date 2/5/99. Number of pages: 25. [97-1148, 97-2096, 97-2097] (THIS PROOF BRIEF REPLACES PROOF BRIEF FILED 1/22/99) (eim) [97-1148 97-2096 97-2097]
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Cross Appellant,

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7/6/00	U.S. Supreme Court letter filed granting petition for writ of certiorari [2131456-1] filed by Traffix Devices [97-2097] Filed in the Supreme Court on 06-26-00 . (swh) [97-2097]

U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN (FLINT)

CIVIL DOCKET FOR CASE #: 95-CV-40230

MARKETING DISPLAYS, INCORPORATED
Plaintiff

v.

TRAFFIX DEVICES, INCORPORATED
Defendant

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
7/11/95	1	COMPLAINT; jury demand - Receipt # 318205 - Date Fee Received: 7/11/95 (1144) [Entry date 07/17/95]
9/7/95	2	ORDER by Judge Paul V. Gadola, dismissing Count III without prejudice (1016) [Entry date 09/12/95]
1/19/96	6	ANSWER by defendant TrafFix Devices Inc to complaint [1-1] with proof of mailing (1016) [Entry date 01/29/96]
1/19/96	6	AFFIRMATIVE defenses by defendant TrafFix Devices Inc with proof of mailing (1016) [Entry date 01/29/96]
8/1/96	10	Stipulated PROTECTIVE order by Judge Paul V. Gadola regarding the exchange of information deemed confidential by the parties (1144) [Entry date 08/07/96]

8/21/96	13	AMENDED complaint 1 by plaintiff Mkt Displays Inc; jury demand; NSI (1144) [Entry date 08/26/96]
9/30/96	17	ANSWER by defendant TrafFix Devices Inc to amended complaint by Mkt Displays Inc [13-1]; jury demand (1144) [Entry date 10/07/96]
9/30/96	17	AFFIRMATIVE defenses by defendant TrafFix Devices Inc (1144) [Entry date 10/07/96]
9/30/96	17	COUNTERCLAIM by defendant TrafFix Devices Inc against plaintiff Mkt Displays Inc; jury demand (1144) [Entry date 10/07/96]
10/16/96	24	MOTION by plaintiff Mkt Displays Inc for summary judgment with brief, exhibits A through J and proof of mailing (1144) [Entry date 10/23/96]
10/30/96	28	ANSWER by plaintiff Mkt Displays Inc, counter-defendant Mkt Displays Inc to counter claim by TrafFix Devices Inc [17-1] (1144) [Entry date 11/08/96]
10/30/96	29	MOTION by plaintiff Mkt Displays Inc, counter-defendant Mkt Displays Inc to dismiss second counterclaim, or for summary judgment with brief, exhibits A through J and proof of mailing (1144) [Entry date 11/08/96]
11/12/96	31	RESPONSE by defendant TrafFix Devices Inc to motion for summary judgment that Defendant's trademark "windbuster" infringes MDI's trademark "windmaster" by Mkt Displays Inc [24-1] with proof of mailing (1016) [Entry date 11/18/96]

11/12/96	32	APPENDIX by defendant TrafFix Devices Inc to motion response by TrafFix Devices Inc [31-1] (1016) [Entry date 11/18/96]
11/12/96	33	CONFIDENTIAL EXHIBIT A filed by defendant TrafFix Devices Inc to Traffix's brief in opposition to MDI's motion for summary judgment that Defendant's trademark "windbuster" infringes MDI's trademark "windmaster" (filed in sealed envelope) (1016) [Entry date 11/18/96]
11/27/96	34	DECLARATION by Jack Kulp on behalf of defendant TrafFix Devices Inc with attachments (pm) [Entry date 12/03/96]
11/27/96	35	REPLY by plaintiff Mkt Displays Inc to response to motion for summary judgment by Mkt Displays Inc, that Defendant's trademark "windbuster" infringes MDI's trademark "windmaster" [29-2] with attachments and proof of mailing (pm) [Entry date 12/03/96]
11/27/96	36	RESPONSE by defendant TrafFix Devices Inc to motion to dismiss second counterclaim by Mkt Displays Inc, Mkt Displays Inc [29-1], motion for summary judgment by Mkt Displays Inc, Mkt Displays Inc [29-2] with proof of mailing (pm) [Entry date 12/03/96]
12/5/96	39	DECLARATION by Ron Lunt on behalf of plaintiff Mkt Displays Inc (copy) (pm) [Entry date 12/10/96]

12/12/96	41	REPLY by plaintiff Mkt Displays Inc to response to motion to dismiss second counterclaim by Mkt Displays Inc, Mkt Displays Inc [29-1], motion for summary judgment by Mkt Displays Inc, Mkt Displays Inc [29-2] with exhibits A through E and proof of mailing (th) [Entry date 12/17/96]
1/13/97	44	MEMORANDUM opinion and order by Judge Paul V. Gadola denying motion for Rule 11 sanctions by Mkt Displays Inc motion to dismiss Count II of defendant's counterclaim by Mkt Displays Inc, Mkt Displays Inc [29-1], granting motion for summary judgment by Mkt Displays Inc, Mkt Displays Inc on Count I of its amended complaint, Traffix Devices, Inc. is immediately and permanently enjoined from using the mark "Windbuster" (pm) [Entry date 01/16/97]
1/13/97	45	PARTIAL judgment by Judge Paul V. Gadola for Mkt Displays Inc against TrafFix Devices Inc as to Count I of its August 21, 1996 amended complaint, that Defendant Traffix Devices, Inc. take nothing on Count II of its 9/30/96 counterclaim, and that Defendant is immediately and permanently enjoined from using the mark "Windbuster" (pm) [Entry date 01/16/97] [Edit date 02/04/97]
1/27/97	49	APPEAL by defendant TrafFix Devices Inc of order [44-1] to USCA - Fee: paid - Receipt #338820 (h) [Entry date 02/04/97]
1/31/97	51	AMENDED partial judgment entered by Judge Paul V. Gadola (th) [Entry date 02/04/97]

2/4/97	52	CERTIFIED copy of appeal notice by TrafFix Devices Inc [49-1] and docket transmitted to USCA (th)
2/18/97	64	ACKNOWLEDGEMENT from USCA of receipt of appeal notice by TrafFix Devices Inc [49-1] - appeal case # 97-1148 (th) [Entry date 02/21/97]
2/28/97	69	MOTION by plaintiff Mkt Displays Inc for summary judgment that Defendant's dual spring-mounted sign stands infringe MDI's trade dress rights with proof of mailing (pm) [Entry date 03/05/97]
2/28/97	70	MEMORANDUM by plaintiff Mkt Displays Inc in support of motion for summary judgment that Defendant's dual spring-mounted sign stands infringe MDI's trade dress rights with attachments [69-1] (pm) [Entry date 03/05/97]
2/28/97	71	MOTION by defendant TrafFix Devices Inc for summary judgment with brief and exhibits A through N (th) [Entry date 03/05/97]
3/28/97	78	RESPONSE by plaintiff Mkt Displays Inc to motion for summary judgment by TrafFix Devices Inc [71-1] with exhibits A through Y and proof of mailing (th) [Entry date 04/03/97]
3/28/97	79	RESPONSE Brief by defendant TrafFix Devices Inc to motion for summary judgment that Defendant's dual spring-mounted sign stands infringe MDI's trade dress rights by Mkt Displays Inc [69-1] with proof of mailing (th) [Entry date 04/03/97]

3/28/97	80	EXHIBITS F3, J and N filed by defendant TrafFix Devices Inc (filed under seal) in support of brief in opposition to plaintiff's motion for summary judgment that defendant's dual spring mounted sign stands infringe MDI's trade dress (th) [Entry date 04/03/97]
3/28/97	81	APPENDIX by defendant TrafFix Devices Inc to motion response by TrafFix Devices Inc [79-1] with exhibits A through V (th) [Entry date 04/03/97]
4/4/97	85	REPLY by defendant TrafFix Devices Inc to response to motion for summary judgment by TrafFix Devices Inc [71-1] with exhibits A through E and proof of mailing (th) [Entry date 04/15/97]
4/10/97	88	REPLY by plaintiff Mkt Displays Inc to response to motion for summary judgment that Defendant's dual spring-mounted sign stands infringe MDI's trade dress rights by Mkt Displays Inc [69-1] with proof of mailing (th) [Entry date 04/15/97]
6/2/97	97	Amended MEMORANDUM opinion and order by Judge Paul V. Gadola denying motion for Rule li sanctions by Mkt Displays Inc [40-1], granting motion to dismiss second counterclaim by Mkt Displays Inc, Mkt Displays Inc [29-1], granting motion for summary judgment by Mkt Displays Inc, Mkt Displays Inc [29-2], granting motion for summary judgment by Mkt Displays Inc [24-1] (th) [Entry date 06/12/97] [Edit date 06/12/97]

6/12/97	102	PARTIAL judgment by Judge Paul V. Gadola for TrafFix Devices Inc against Mkt Displays Inc (th) [Entry date 06/18/97)
6/12/97	103	MEMORANDUM opinion and order by Judge Paul V. Gadola granting motion for summary judgment by TrafFix Devices Inc [71-1], denying motion for summary judgment that Defendant's dual spring-mounted sign stands infringe MDI's trade dress rights by Mkt Displays Inc [69-1] (th) [Entry date 06/18/97]
6/24/97	106	Motion by plaintiff Mkt Displays Inc for reconsideration of order [103-17], partial judgment [102-1] with proof of mailing (pm) [Entry date 07/01/97]
6/24/97	107	MEMORANDUM by plaintiff Mkt Displays Inc in support of motion for reconsideration of order [103-1], partial judgment [102-1] [106-1] (filed in sealed package) (pm) [Entry date 07/01/97]
7/8/97	110	STIPULATED ORDER by Judge Paul V. Gadola that Traffix Devices Inc's counterclaim count I is dismissed without prejudice (th) [Entry date 07/17/97]
7/9/97	111	ORDER by Judge Paul V. Gadola denying motion for reconsideration of order [103-1], partial judgment [102-1] by Mkt Displays Inc [106-1] (th) [Entry date 07/17/97]
7/25/97	114	MOTION by plaintiff Mkt Displays Inc for an order certifying the court's June 10, 1997 order for interlocutory appeal with brief & proof of mailing (th) [Entry date 08/06/97] [Edit date 08/06/97]

7/30/97	115	MOTION by defendant TrafFix Devices Inc for certification of plaintiff's trade dress claim and Traffix's antitrust claim as final for purposes of appeal with brief, attachments and proof of mailing (th) [Entry date 08/18/97]
9/11/97	119	ORDER by Judge Paul V. Gadola granting motion for certification of plaintiff's trade dress claim and Traffix's antitrust claim as final for purposes of appeal by TrafFix Devices Inc [115-1], granting motion for an order certifying the court's June 10, 1997 order for interlocutory appeal by Mkt Displays Inc [114-1] (th) [Entry date 09/17/97]
10/1/97	124	APPEAL by plaintiff Mkt Displays Inc of partial judgment [102-1] to USCA - FEE: paid - Receipt #: 350582 (th) [Entry date 10/15/97]
10/3/97	125	APPEAL by defendant TrafFix Devices Inc of partial judgment [45-1] to USCA - FEE: paid - Receipt #: 350680 (th) [Entry date 10/15/97]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 95-CV-402330

Marketing Displays, Inc.,

Plaintiffs,

-vs-

TrafFix Devices, Inc.,

Defendant.

JURY TRIAL DEMANDED
Hon. Paul V. Gadola

AMENDED COMPLAINT AND JURY DEMAND

THE PARTIES AND JURISDICTION

1. Plaintiff, Marketing Displays, Inc. ("MDI"), is a Michigan corporation, having a place of business at 38271 West Twelve Mile Road, Farmington Hills, Michigan 48331.

2. Upon information and belief, defendant TrafFix Devices, Inc. ("TrafFix") is a California corporation, having a place of business at 220 Calle Pintoresco, San Clemente, California 92672 and is doing business in this district.

3. The claims herein arise under the Lanham Act, 15 U.S.C. § 1051 et seq.

4. This Court has jurisdiction over the counts of this action based on 28 U.S.C. §§ 1338 and 1367.

COUNT I - VIOLATIONS OF FEDERAL LANHAM ACT TRADEMARK INFRINGEMENT

5. MDI is a leading developer and manufacturer of sign systems in the United States and has secured a number of trademarks and other intellectual property rights protecting its developments.

6. In this regard, MDI owns and uses the trademark WINDMASTER® which is protected by incontestible Federal Trademark Registration No. 1,068,875.

7. MDI has used the WINDMASTER® mark since 1968.

8. By continuous and substantial advertising, use and promotion of the mark to date, MDI has acquired tremendous value, name recognition and good will in the mark.

9. TrafFix has begun using the name "WINDBUSTER" in interstate commerce in connection with the marketing, promotion and sale of sign systems virtually identical to MDI's sign system.

10. TrafFix's use of the name "WINDBUSTER" is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of TrafFix with MDI, or as to the origin, sponsorship, or approval of TrafFix's goods by MDI.

11. TrafFix's use of "WINDBUSTER" as described above violates sections 32 and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114 , 1125 (a) .

12 . MDI has been irreparably compensably injured as a result of TrafFix's conduct.

13. This infringement by defendant was willful.

COUNT II - INFRINGEMENT OF MDI'S TRADE DRESS IN VIOLATION OF 15 U.S.C. § 1125(A)

14. MDI hereby incorporates by reference the allegations contained in Paragraphs 5 through 13 as if set forth fully herein.

15. For at least ten years, MDI has advertised, marketed, promoted and sold WINDMASTER® portable sign systems.

16. MDI's WINDMASTER® portable sign systems incorporate a pair of closely spaced upright coil springs positioned on a narrow base with angled legs extending therefrom, the overall appearance of which represents an inherently distinctive trade dress serving to identify a unique source of those sign systems.

17. Additionally, MDI's WINDMASTER® portable sign system has obtained a secondary meaning in the marketplace.

18. TrafFix has initiated advertising, marketing and selling of a portable sign system incorporating a trade dress which is confusingly similar to the protectable trade dress of MDI, for its own portable sign system.

19. TrafFix's use of a trade dress confusingly similar to that owned by MDI, as well as a mark confusingly similar to the registered incontestable trademark of MDI, is likely to cause confusion, to cause mistake, or to deceive as to an affiliation, connection or association as to origin, sponsorship or approval of TrafFix's goods, or to misrepresent the nature, characteristics or qualities of TrafFix's goods, all in violation of 15 U.S.C. § 1125 (a).

20. TrafFix's infringement as outlined in this Count has been willful.

21. MDI has suffered an irreparable, compensable injury, and will continue to suffer an irreparable, compensable

injury unless the infringement of TrafFix is preliminarily and then permanently enjoined.

COUNT III - COMMON LAW UNFAIR COMPETITION

22. MDI hereby incorporates by reference the allegations contained in Paragraphs S through 21 as if set forth fully herein.

23. The actions of TrafFix in advertising, marketing and distributing portable sign systems which incorporate a trade dress and mark confusingly similar to the protectable trade dress and registered mark of MDI constitute unfair competition under the common law of Michigan.

24. Upon information and belief, TrafFix undertook the copying of MDI's trade dress in its portable signs willfully, or with a reckless intention of trading upon the goodwill of MDI, and/or with the intent of confusing purchasers into believing that TrafFix's portable signs were approved, authorized by, or related to MDI.

25. MDI has suffered an irreparable, compensable injury, and will continue to suffer an irreparable, compensable injury unless the unfair competition of TrafFix is preliminarily and permanently enjoined.

COUNT IV - VIOLATIONS OF FEDERAL LANHAM ACT UNFAIR COMPETITION

26. MDI hereby incorporates by reference the allegations contained in Paragraphs 5 through 25, as if set forth fully herein.

27. TrafFix Devices intentionally misled consumers into believing that its WINDBUSTER sign stands were in some way associated with or sponsored by MDI.

28. TrafFix Devices intentionally misled consumers by submitting estimates to provide its WINDBUSTER sign stands on bids that sought products described as WINDMASTER or equivalent.

29. Upon information and belief, TrafFix Devices provided its WINDBUSTER products to customers and represented that it was a WINDMASTER or equivalent to a WINDMASTER.

30. Such conduct by TrafFix Devices was done willfully or with a reckless intention of trading upon the goodwill of MDI, and/or with the intent of confusing purchasers into believing that TrafFix's portable sign stands were approved, authorized by or related to MDI.

31. MDI has suffered an irreparable, compensable injury and will continue to suffer an irreparable, compensable injury unless the unfair competition of TrafFix is preliminarily and permanently enjoined.

32. TrafFix Devices' conduct as outlined in this Count has been willful.

DEMAND FOR RELIEF

Wherefore, plaintiff MDI respectfully requests this Court to:

A. Temporarily, preliminarily and permanently enjoin TrafFix, its officers, agents, servants, employees and attorneys and all those persons in active concert or participation with them from

i) using the mark "WINDBUSTER" or any confusingly similar designation, alone or in combination with other words or symbols, as a trademark, service mark, trade name component, or otherwise, to market, advertise or identify TrafFix's sign systems or other goods or services;

ii) making, using, selling or inducing others to make, use or sell portable sign systems having a trade dress which is confusingly similar to the protectable trade dress of the portable sign system of MDI; and

iii) unfairly competing with MDI in any manner whatsoever.

B. Award MDI both compensatory and exemplary damages for the counts stated herein.

C. Determine that the violations of MDI's rights by TrafFix are willful.

D. Award MDI damages and attorney fees under 15 U.S.C. § 1117 for TrafFix's trade dress and trademark infringement;

E. Determine that this case is "exceptional" under 15 U.S.C. § 1117, and enhance the damages;

F. Award MDI any additional damages, including punitive damages, to which it is entitled for TrafFix's unfair competition;

G. Award MDI its costs; and

H. Awarded such other and further relief as the Court may deem just and equitable.

JURY DEMAND

Plaintiff Marketing Displays, Inc. hereby demands a trial by jury for all issues so trial.

Respectfully submitted,

BROOKS & KUSHMAN P.C.

By: /s/ John S. Artz

John A. Artz (P 24679)
John S. Artz (P 48578)
1000 Town Center
Twenty-Second Floor
Southfield, Michigan 48075
(810) 358-4400

Date: August 20, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO. 95-40230
HONORABLE PAUL V. GADOLA
U.S. DISTRICT JUDGE

MARKETING DISPLAYS, INC.,

Plaintiff,

v.

TRAFFIX DEVICES, INC.,

Defendant.

AMENDED PARTIAL JUDGMENT

This action came before this court, the Honorable Paul V. Gadola, District Judge presiding, and the issues having been fully presented and the court being fully advised in the premises, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that final judgment, as to liability only, is entered in favor of the plaintiff, MARKETING DISPLAYS, INC., as to Count I of its August 21, 1996 amended complaint.

IT IS FURTHER ORDERED AND ADJUDGED that defendant, TRAFFIX DEVICES, INC., is immediately and permanently **ENJOINED** from using the mark "**WINDBUSTER**."

IT IS FURTHER ORDERED AND ADJUDGED that defendant, TRAFFIX DEVICES, INC., take nothing on Count II of its September 30, 1996 counterclaim.

IT IS FURTHER ORDERED that the clerk of the court serve a copy of this judgment by United States mail on counsel for the parties named in the caption above.

SO ORDERED.

Dated: 1/29/97 /s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 95-CV-402330

Marketing Displays, Inc.,

Plaintiff,

-vs-

TrafFix Devices, Inc.,

Defendant.

Hon. Paul V. Gadola

ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS TO AMENDED COMPLAINT

I. ANSWER

Defendant, TrafFix Devices, Inc. answers the Amended Complaint and Jury Demand as follows:

THE PARTIES AND JURISDICTION

1. Admitted.

2. Admitted.

3. Defendant admits only that the Lanham Act, 15 U.S.C. §1051 et. seq. covers trademark and trade dress infringement and certain types of unfair competition. Defendant denies that common law unfair competition arises under the Lanham Act.

4. Admitted.

ANSWER TO COUNT I - VIOLATIONS OF FEDERAL LANHAM ACT TRADEMARK INFRINGEMENT

5. Defendant is without knowledge or information sufficient to form a belief as to truth of the allegations of Paragraph 5 and therefore denies the same.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6 and therefore denies the same.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 and therefore denies the same.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 8 and therefore denies the same.

9. Defendant admits only that it is using the mark "WINDBUSTER" in interstate commerce for sign systems and denies all other allegations of Paragraph 9.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

ANSWER TO COUNT II - INFRINGMENT OF MDI'S TRADE DRESS IN VIOLATION OF 15 U.S.C. 91125(A)

14. Defendant repeats its responses to Paragraphs 5-13, above.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 and therefore denies the same.

16. Defendant admits that Plaintiff's WINDMASTER sign systems incorporate upright coil springs and angled legs, but denies all other allegations of Paragraph 15.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

ANSWER TO COUNT III - COMMON LAW UNFAIR COMPETITION

22. Defendant repeats its response to Paragraphs 5-21, above.

23. Denied.

24. Denied.

25. Denied.

ANSWER TO COUNT IV - VIOLATIONS OF FEDERAL LANHAM ACT UNFAIR COMPETITION

26. Defendant repeats its responses to Paragraphs 5-25, above.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

II. AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's recently added claim for violations of the Lanham Act should be dismissed for failure to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's alleged trade dress is not distinctive.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's alleged trade dress does not have secondary meaning.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's alleged trade dress is functional.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's alleged trade dress is generic.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff can recover nothing because of Plaintiff's unclean hands in seeking to appropriate unto itself, under the guise of trade dress, construction features of its sign which it knew or should have known were in the public domain.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's conduct in seeking to appropriate unto itself, under the guise of trade dress, construction features of its sign which it knew were in the public domain constitutes a violation of the Antitrust Laws of the United States.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's and Defendant's trademarks and trade dress are not confusingly similar.

NINTH AFFIRMATIVE DEFENSE

Defendant's use of its trademark and product configuration creates no likelihood of confusion, as Plaintiff's and Defendant's goods are marketed to a trade in which the purchasers are highly aware of the source of the purchased goods.

TENTH AFFIRMATIVE DEFENSE

There is no likelihood of confusion as between the configuration Defendant's products and the configuration of Plaintiff's products.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for unfair competition under common law must fail because its trade dress and trademark claims fail as indicated herein.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff may not recover from Defendant on any of its claims because it has suffered no damages.

III. COUNTERCLAIMS

GENERAL ALLEGATIONS

1. Marketing Displays, Inc. (MDI) is a Michigan corporation engaged in the sale of traffic sign stands.

2. TrafFix Devices, Inc. (TrafFix) is a California corporation engaged in the sale of traffic sign stands.

COUNTERCLAIM COUNT I - VIOLATION OF 15 U.S.C. 1125(A)

3. TrafFix repeats and realleges paragraphs 1 and 2 of these Counterclaims.

4. TrafFix does not believe that newly added Count IV of Plaintiff's Complaint states a cause of action against Defendant. However, if Count IV of Plaintiff's Complaint states a cause of action against TrafFix, MDI is equally liable because it has engaged in the same type of conduct.

5. This claim arises under the Lanham Act, 15 U.S.C. §1051 et. seq.

6. This Court has jurisdiction over the subject matter of this claim pursuant to 28 U.S.C. §1338.

7. MDI intentionally misled consumers by submitting estimates to provide its WINDMASTER sign stands on bids that sought products described by WINDBUSTER or equivalent.

8. Upon information and belief, MDI provided its WINDMASTER product to customers and represented that it was a WINDBUSTER or equivalent to a WINDBUSTER.

9. Such conduct by MDI was done willfully or with reckless intention of trading upon the goodwill of TrafFix and/or with the intent of confusing purchasers into believing that MDI's portable sign stands were approved, authorized by or related to TrafFix.

10. TrafFix has suffered an irreparable damage and will continue to suffer damage unless the unfair competition of MDI is enjoined.

11. MDI's conduct as outlined and this counterclaim has been willful.

COUNTERCLAIM COUNT II - ANTITRUST VIOLATIONS

12. TrafFix repeats and realleges paragraphs 1 - 11 of these Counterclaims.

13. The subject matter jurisdiction of this Court arises under 28 U.S.C. 1337 in that this is (a) an action under Section 4 of the Clayton Act, 15 U.S.C. 15, to recover threefold damages sustained by TrafFix, and the cost of suit, including reasonable attorney fees, for injuries sustained by TrafFix in its business and/or property by reason of the violation by Marketing Displays, Inc. (MDI) of Section 2 of the Sherman Act, 15 U.S.C. §2, and (b) an action under Section 16 of the Clayton Act, 15 U.S.C. §26, for injunctive relief for threatened loss or damage to TrafFix by MDI's violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

14. On information and belief, MDI has monopoly power in the market for wind resistant sign stands mounted on dual springs in the United States.

15. Alternatively, on information and belief, there is a dangerous probability that MDI will achieve monopoly power in the market for wind resistant sign stands mounted on dual

springs in the United States unless the unlawful activity described below is ordered to cease.

16. MDI has willfully acquired and maintained its monopoly power by asserting patent rights under the guise of trade dress in an invention after the expiration of the patent.

17. MDI obtained United States Patent Number 3,646,696 for a portable, spring mounted, windproof sign stand with a lightweight base more than 17 years ago.

18. MDI successfully asserted United States Patent Number 3,646,696 against sign stands having a dual spring construction similar to that now utilized by TrafFix.

19. The construction features of MDI's sign stand are subject to the free use of the public as a matter of federal patent law because they were covered by a United States patent which issued more than 17 years ago.

20. MDI knew when it filed this lawsuit that the patent on the claimed inventions had expired, that the construction features of the sign stand were in the public domain, and that attempts to continue its patent rights, under the guise of trade dress, were unlawful.

21. MDI's market power in the relevant market is a direct result of its having asserted, to TrafFix and other marketers of sign systems, a protectible interest in the construction features of the expired patent claims in the pretext of claims for trademark infringement and unfair competition.

22. After the patents expired, MDI's attempts to claim a protectible and trade dress interest in expired patent claims was in bad faith.

23. MDI's enforcement activity against TrafFix and others has been with the specific intent to destroy competition in the relevant market.

24. MDI commenced this action against TrafFix for the purpose and with the intent to destroy competition in the relevant market.

25. MDI's asserting a protectible interest in the construction features of an expired patent, knowing the assertion of a protectible interest is invalid, has injured competition in the relevant market.

26. TrafFix has been injured in its business and/or property by reason of MDI's monopolization and attempt to monopolize.

WHEREFORE Defendant Prays:

a. The Complaint be dismissed with prejudice;

b. that MDI be enjoined from all further acts in violation of the Lanham Act;

c. that TrafFix be awarded damages and attorney fees under 15 U.S.C. §1117 and that such damages be trebled;

d. TrafFix recover against MDI treble damages and attorney fees for the injury it has sustained by reason of MDI's violation of the antitrust laws;

e. The court enjoin MDI from its unlawful activity in violation of the antitrust laws;

f. the Court award TrafFix its costs and attorney fees; and

g. such other and further relief as the Court may deem just and equitable.

JURY DEMAND

TrafFix hereby demands a trial by jury for all counterclaim issues so triable.

Respectfully submitted,

REISING, ETHINGTON,
BARNARD & PERRY, L.L.P.

/s/ Jeanne-Marie Marshall
Jeanne-Marie Marshall (P-38564)
Richard W. Hoffmann (P-42352)
201. W. Big Beaver Rd., Ste. 400
Troy, Michigan 48084
(810) 689-3500

September 26, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v

TRAFFIX DEVICES, INC.,

Defendant.

Hon. Paul V. Gadola
Civil Action No. 95-CV-40230

DECLARATION OF JOHN SARKISIAN

I, John Sarkisian, hereby declare and state as follows:

1. I am submitting this Declaration in support of Marketing Displays, Inc.'s ("MDI") Motion For Summary Judgment relative to the trademark issue.

2. I have been employed at MDI since 1982. I am presently Sales Manager for MDI's Traffic Control Products Division. I have been in that position since about 1993. Prior to becoming Sales manager, I was Field Sales Manager from 1992 to 1993, I was regional manager of sales from 1987-1992, and I also worked in inside sales for MDI's point of purchase products prior to 1987.

3. I am currently in charge of the sales and marketing of all of MDI's traffic control products. As a result of my experience with MDI, I am also familiar with the amount of sales of MDI's WINDMASTER products and the amount of

money that was and is spent on sales and advertising for MDI's WINDMASTER products.

4. As part of my present responsibilities, I travel to various trade shows and to various MDI customers selling and marketing MDI's traffic control products. Consequently, I am familiar with MDI's product lines and many of its trademarks, including the WINDMASTER trademark.

5. I have also become familiar with the history of MDI's WINDMASTER trademark.

6. One line of product that MDI sells is a line of spring-mounted wind resistant sign stands. MDI manufactures these wind resistant sign stands and has been manufacturing and selling a wind resistant sign stand since 1968.

7. The first wind resistant sign stand was a business-type sign stand that was sold and advertised under the mark WINDMASTER. This business-type sign stand was designed to be used to advertise products at the place where purchasers could buy that product. One example would be at gas station food marts.

8. In the mid 1970's, MDI began manufacturing and selling a traffic-type wind-resistant sign stand for use in the traffic control industry. The design of this sign stand was different from the business-type sign stand. This wind resistant sign stand was also sold and marketed under the mark WINDMASTER. Purchasers have come to identify MDI as the manufacturer of this sign stand.

9. Since the introduction of the WindMaster product, MDI has spent, on average, tens of thousands of dollars each year advertising its WINDMASTER products. The advertising has been through literature, customer contacts, direct mailings, and trade shows. MDI has also had, on average, over a couple million dollars in sales of the WINDMASTER product each year.

10. Moreover, MDI has sold a significant number of wind resistant sign stands for the traffic control industry each

year since its inception in 1976 and has been using the mark exclusively in that field for over 20 years. MDI's WINDMASTER sign stands are sold by direct and distributor sales to contractors, government entities, utilities, and police and fire departments. Additionally, based on my experience, these purchasers typically are not very informed about purchasing decisions and take very little time in making their purchasing decisions.

11. As a result, MDI's WINDMASTER mark and its product have enjoyed substantial commercial successes and the mark and the products have developed substantial good will in the traffic control industry.

12. I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

Dated: October 11, 1996

/s/ John Sarkisian
John Sarkisian

Int. Cl: 6
Prior U.S. Cl: 13
United States Patent Office

Reg. No. 1,068,875
Registered July 5, 1977

TRADEMARK
Principal Register

WINDMASTER

Marketing Displays, Inc.
(Michigan corporation)
24450 Indoplex
Farmington Hills, Mich. 48024

For: METAL NON-TIPPABLE DISPLAY APPARATUS FOR USE IN HOLDING AND DISPLAYING SIGNS, POSTERS, METAL PANELS, AND ADVERTISING MESSAGES, in CLASS 6 (U.S. CL. 13).
First use February 1968; in commerce February 1968.

Ser. No. 84,099, filed Apr. 16, 1976.

ABRAM I. SACHS, Supervisory Examiner
G.T. GLYNN, Examiner

REGISTERED FOR A TERM OF 20 YEARS FROM JULY 5, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

-vs-

TRAFFIX DEVICES, INC.,

Defendant.

Case. No, 95-CV-40230
Hon. Paul V. Gadola

The Deposition of JACK KULP was taken in the above-entitled cause before me, Sylvia A. Doyle, a Court Reporter (CSR-1418) and Notary Public for the County of Oakland, State of Michigan, acting in the County of Oakland, at Reising, Ethington, Barnard & Perry, 201 West Big Beaver Road, Suite 400, Troy, Michigan, on Monday, August 5, 1996, commencing at or near the hour of 1:15 p.m.

APPEARANCES:

MR. JOHN A. ARTZ
MR. JOHN S. ARTZ
Brooks & Kushman
1000 Town Center
22nd Floor
Southfield, MI 48075
(810) 358-4400
Appearing on behalf of the Plaintiff.

A We incorporated October the 23rd, 1987. I'm sorry, '86. I beg your pardon, '86, wrong.

Q And who are the other owners of TrafFix other than yourself?

A My son, Brent Kulp, and Walter Kuczera are shareholders.

Q Can you give me the approximate percentage of ownership of the three of you?

A Brent has about 8 percent, Walter has 7 percent and I have about 85 percent.

MS. MARSHALL: Just for the record, John, I know we've got a Protective Order that's been signed by the parties that we have been operating under and any information is confidential and you feel should not disclosed in front of a representative -- in front of MDI and I miss it, please feel free to let me know.

MR. S. ARTZ: We already mentioned that Good point.

MR. ARTZ: I do want to get into some of the sales data later. At that point we will have a separate confidential

* * * * *

[Pages 12-17 ommited]

money. I went in and ran it in the sales capacity for machinery and machinery sales manager for about 18 months. Was promoted to general manager, then to president of the division. We turned the division around and about that time Lear Siegler acquired Royal -- all the outstanding stock and assets of Royal Industries.

I made the transition from Royal to Lear and continued on as president of the Plasties division. At the same time I -- or actually just before the take over by Lear of Royal I was given another assignment to run another division of Royal Industries called the signal division which was in road safety products, that was in 1973. And so for a short period I ran three divisions; the Plasties division and the signal division of Royal Industries and then I located a replacement to run the Plasties division which was subsequently sold and I continued on running the signal division as president. At that point of Lear

Siegler -- or of Royal Industries, 1974, '75 Royal Industry stock was acquired by Lear Siegler, I made the transmission and continued to run the signal division of Lear Siegler until September 30th of 1986 at which time my division was sold and I was out of a job.

Q Then you formed TrafFix Devices?

A Ugh-ugh.

Q All right. Did TrafFix Devices continue generally in the same line of business as the signal division of Lear Siegler?

A That's correct.

Q Who was the division sold to?

A Sold to Flexolight, division of Lucan Steel for ten and a half million dollars.

Q How do you spell DICO?

A D-I-C-O. Stood for Dairy Industries Corporation of America.

Q And where were they located?

A Des Moines, Iowa.

Q You said that. How about Royal Industries?

A Well, the headquarters of Royal Industries -- the corporate headquarters was in Pasadena, California. And the corporate headquarters of

Lear Siegler was in Santa Monica, California.

Q That's where you reported to work everyday when you were president of the signal division?

A No, I headed my own plant.

Q Where was that?

A Plants. I had one in East Los Angeles and another one in -- another plant in Montebello, California, a molding plant; injection and compression molding.

Q What products did the signal division sell?

A We sold arrow board trailers -- made and sold arrow board trailers. We sold plastic channelizer drums, the orange drums. We sold roof mounted arrow boards, sold backup alarms, we sold strobe lights, revolving lights and, for about four or five years we sold some of the WindMaster products; sign stands -- the sign stands only. I don't believe we sold any signs.

Q What period of time was that that you sold the WindMaster products?

A Oh, I want to say '79; 1979 or '80. May have been a little earlier or a little later, I'm

just not sure.

Q Did you sell them just during that two-year period?

A No, no, that's when we began selling them.

Q You sold them up until the time you --

A Up until the time I was terminated, right.

Q Okay. Does the Flexolight division still sell the WindMaster, to your knowledge?

A Not to my knowledge. I don't believe they do.

Q Did they for a period of time?

A I think so, but I'm not certain about that either.

Q Do you know who the president is of Flexolight or who was it at the time that they bought Lear Siegler's signal division?

A The president at the time that they bought the signal division was a guy by the name of -- I'm having a block. Fred Piel.

Q Did he stay on as president of the Flexolight division, to your knowledge?

A After they acquired my division?

Q Yes.

A Yes.

Q Is he still there?

* * * * *

[Pages 22-33 Omitted]

Q Why was it necessary to add the resilient member springs to that sign stand to hold a rigid sign?

A The springs are the most economical and the most reliable method of spilling the wind on a rigid sign which itself will not flex or bend.

How did you come to the conclusion it was necessary to market this product to complete your line; was this from input from your customers, input from your salespeople?

A No, you just stand out there, you look at the market and you say, we need this to be able to complete or product line.

We didn't ask customers, no, just it was my realization that we needed to have that.

Q Was the WindMaster sign stand a decent selling product at the Lear Siegler signal division?

A I recall it being about -- I recall, and it's been a long time, but I recall our contract quantity was about 6,000 sign stands a year that we had to sell in order to maintain the price that they were giving us.

Q Did you meet that?

A My recollection is we did.

Q Would you call it a pretty good selling product?

How would you characterize it, put it that way? Use your own words.

A Okay.

Q How are your products sold to the marketplace, you being TrafFix Devices?

A What do you mean specifically?

Q How are they sold to customers?

You have salesmen, distributors, you have reps – –

A We have three channels of distribution. We have distributors who buy our products for resale to road contractors or for their own consumption, for their own use. Many of them, are also rental companies.

We sell to state agencies, large cities and counties on competitive bids, and we would sell in rare instances directly to contractors or end-users if we don't have adequate distribution in the area.

Q Do you make a distinction between distributors and manufacturer reps?

* * * * *

[Pages 36-62 Omitted]

aluminum.

Q Was that one of your factors in choosing steel over aluminum?

A I don't know that -- I don't recall that I thought of that at the time.

Q All right. Now the Interrogatory Answers credit Mr. Kuczera with selecting the name WindBuster.

A That's correct.

Q Could you state for the record, to the best of your recollection, why that was that he chose the name WindBuster?

A You know, we had conversations about what we were going to call this product and I -- we went back and forth with probably more names than I can even dream of over a period of time. And the sign stand is primarily used in the construction work zone and wind is a function -- is a reality and it's a function that exists -- something that exists in the work zone, so we thought that wind would be appropriate and we wanted a wind resistant stand and we wanted to connotate that it was wind resistant; it isn't rain resistant, it

isn't sun resistant, it's wind resistant and Walter came up with the idea, as my recollection, of calling it a WindBuster like breaking and busting a bronco and we both just liked the name WindBuster. It was his idea and I liked it.

Q WindBuster has been used as a one word name by TrafFix Devices?

A That's correct.

Q Do you know why you picked one word rather than two?

A No.

Q Also, on this brochure, Exhibit 4, the WindBuster name is capital W and capital B?

A That's correct.

Q That's the original way that you decided to use the name, you being TrafFix Devices?

A The primary way.

Q Is it still the primary way?

A Yes.

Q The WindBuster sign stand competes with Marketing Displays' WindMaster sign stand?

A Not really.

Q What is the basis for your answer?

* * * * *

[Pages 65-103 Omitted]

read the whole thing.

BY MR. ARTZ:

Q Okay, read the whole answer.

MS. MARSHALL: I think the question is on the preceding page.

THE WITNESS: That's Interrogatory 14, but that's not Interrogatory 14 he's asking.

MS. MARSHALL: That's the answer:
(Whereupon, discussion off the record.)

THE WITNESS: Now, will you ask me your question? I've read the Interrogatory.

BY MR. ARTZ:

Q Can I see it please?

You agree with the statement that TrafFix Devices knew that Marketing Displays, Inc., SteelMaster and WindMaster sign stands were well received in the industry?

A I agree with that statement.

Q You agree with the rest of Interrogatory

* * * * *

[Pages 105-113 Omitted]

recollection.

Q And who was involved with you in the selection process?

A Basically me.

Q Mr. Kuczera, was he involved, too?

A We talked about it; Walt and myself.

Q After you decided what the design should be, what was the next step?

Did someone draw it up?

Did you take it to a manufacturer to get the parts made?

What did you do?

A We sent -- we made some drawings and we sent the -- we sent one of the competitive sign stands to our -- to our man in Korea and we -- at the same time that we were doing that we were doing some preliminarily tooling that was required for long lead time items and said this is the way that we basically want the sign stand to perform and we said we want to make one similar to this.

Q You actually sent a sign stand to them?

A Yes, that's correct.

Q Was it the WindMaster?

A It was a WindMaster.

Q Was it a SteelMaster?

A It was a WindMaster only. But we had already decided on different size tubing, on a different leg configuration, deployment configuration and different rigid and roll-up sign holders.

Q And then what was the next step? Did he send a prototype to you or did you start manufacturing --

A We began to do the tooling and ultimately resulted in a prototype to evaluate.

Q How close was the prototype to what's shown in this WindBuster exhibit?

A Very close except that we had initially decided on a different leg deployment configuration and we had some coil winding -- spring winding problems to solve. Our springs, we thought, were too soft.

Q Were the springs out-sourced? Did you have those manufactured specifically for you?

A I don't understand that question.

Q Let me strike that.

Did you just go buy springs

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

-vs-

TRAFFIX DEVICES, INC.,

Defendant.

Case No. 95-CV-40230
Hon. Paul V. Gadola

CONFIDENTIAL RECORD

The Deposition of JACK KULP was taken in the above-entitled cause before me, Sylvia A. Doyle, a Court Reporter (CSR-1418) and Notary Public for the County of Oakland, State of Michigan, acting in the County of Oakland, at Reising, Ethington, Barnard & Perry, 201 West Big beaver Road, Suite 400, Troy, Michigan, on Monday, August 5, 1996, commencing at or near the hour of 4:15 p.m.

APPEARANCES:

MR. JOHN A. ARTZ
MR. JOHN S. ARTZ
Brooks & Kushman
1000 Town Center
22nd Floor
Southfield, MI 48075
(810) 358-4400
Appearing on behalf of the
Plaintiff.

Q Let me ask you one question that really isn't confidential but I think I will ask you because I saw it in my note here.

On these competitive bid situations, there are certain people at the state agency that TrafFix Devices is dealing with?

A That's correct.

Q Do you have any knowledge of how many products these people in the state agency deal with other than sign stands?

A Oh, thousands, thousands, thousands -- well, many products.

Q They would be the main buyers for the state agency for all of its products then?

A Some states have specialized buyers that deal in certain commodities and other groups of

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.

Plaintiff

v.

TRAFFIX DEVICES, INC.,

Defendant

CASE NO. 95-40230
HON. PAUL V. GADOLA

DEFENDANT'S ANSWERS AND OBJECTIONS TO PLAINTIFF'S INTERROGATORIES (1-16)

GENERAL OBJECTIONS AND PROVISOS

1. Within certain of the Interrogatories propounded by Marketing Displays, Inc. there are self-serving statements of alleged

INTERROGATORY NO. 3

Describe all goods and services marketed and/or sold by Defendant under the mark WINDBUSTER, and identify all documents referring or relating to said marketing and sales.

RESPONSE TO INTERROGATORY NO. 3

TrafFix Devices, Inc. objects to this Interrogatory on the ground that the term "relating to" is vague and ambiguous insofar as TrafFix Devices, Inc. from the scope of this

Interrogatory. The Interrogatory is further objectionable insofar as it is overbroad and burdensome, insofar as the term "relating to" could be interpreted to encompass all of TrafFix Devices, Inc.'s confidential business records having any relation to TrafFix Devices, Inc.'s sign business.

TrafFix Devices, Inc. also objects to this Interrogatory on grounds that it seeks confidential/trade secret information of TrafFix Devices, Inc., which will be produced only upon entry of a suitable protective order.

TrafFix Devices, Inc. further objects to this Interrogatory on grounds that it is compound and complex.

Nevertheless, TrafFix Devices, Inc. answers this Interrogatory to the following extent: TrafFix Devices, Inc. markets under the mark "WINDBUSTER" only the product shown in the attached catalog sheets, specifically the traffic warning sign stands designated Model No. 24108 WINDBUSTER Sign Stand.

INTERROGATORY NO. 9

Identify and describe the channels of distribution and/or intended channels of distribution in the United States for each product or service sold or offered for sale by Defendant under Defendant's mark.

RESPONSE TO INTERROGATORY NO. 9

There are basically three channels of distribution for WINDBUSTER sign stands:

1) They are sold to distributors who resell or rent them to contractors;

2) They are sold directly to government agencies on a bid basis;

3) They are occasionally sold directly to large end users such as utilities or major contracting companies.

INTERROGATORY NO. 14

With respect to the design of the product sold under Defendant's mark, state how it was conceived and selected, the reasons for adopting it, the person(s) involved, and the identity of all documents relating to the conception, selection and adoption.

RESPONSE TO INTERROGATORY NO. 14

TrafFix Devices, Inc. objects to this Interrogatory on the ground that the term "relating to" is vague and ambiguous insofar as TrafFix Devices, Inc. cannot fairly evaluate what documents are included in or excluded from the scope of this Interrogatory. The Interrogatory is further objectionable insofar as it is overbroad and burdensome, insofar as the term "relating to" could be interpreted to encompass all of TrafFix Devices, Inc.'s confidential business records having any relation to TrafFix Devices, Inc.'s sign business.

Nevertheless, TrafFix Devices, Inc. states that TrafFix Devices, Inc.'s WINDBUSTER sign stand was reverse-engineered from a STEELMASTER sign stand purchased on the open market. Its creation resulted from TrafFix Devices, Inc.'s need to have available portable stands for rigid signs, which need to be designed to spill wind. TrafFix Devices, Inc. knew that Marketing Displays, Inc.'s STEELMASTER and WINDMASTER sign stands were well received in the industry for that purpose, and that the patent protection for them had expired.

Following exposure of a prototype to potential customers at the American Highway and Traffic Safety Association(AHTSA) show in San Jose, California, in February, 1994, some modifications were made, including a new leg release (which is different from that of WINDMASTER sign stands) and special brackets for rigid and roll-up signs. No documents evidencing the above facts are available; the design process was quite informal.

Under penalty of perjury, JACK H. KULP declares as follows:

I am an officer of TrafFix Devices, Inc., and a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing Answers and Objections to Plaintiffs Interrogatories and know its contents. The matters stated in it are true to the best of my knowledge and belief.

/s/ Jack H. Kulp
JACK H. KULP, President,
TrafFix Devices, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Marketing Displays, Inc.

Plaintiff

v.

TrafFix Devices, Inc.,

Defendant

CASE NO. 95-40230
HON. PAUL V. GADOLA

DEFENDANT'S ANSWERS TO PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSIONS (19-31)

REQUEST NO. 19

Admit that Defendant is using the mark WINDBUSTER in connection with all-steel wind-resistant traffic sign stands.

RESPONSE TO REQUEST NO. 19

Admitted.

REQUEST NO. 20

Admit that Defendant is using the mark WINDBUSTER in connection with all-steel wind-resistant traffic sign stands that are painted orange and black.

RESPONSE TO REQUEST NO. 20

Admitted.

REQUEST NO. 21

Admit that Defendant is using the mark WINDBUSTER in connection with wind-resistant traffic sign stands.

RESPONSE TO REQUEST NO. 21

Admitted.

Respectfully submitted,

HARRY G. WEISSENBERGER, INC.
Attorneys for Defendant

Date: 19 July 1996

By /s/ Harry G. Weissenberger

Harry G. Weissenberger
24221 Calle de la Louisa, #309
Laguna Hills, CA 92653-7602
Tel: (714) 380-4046
Fax: (714) 380-1179

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v.

TRAFFIX DEVICES, INC.,

Defendant.

CIVIL ACTION NO. 95-CV-40230
HON. PAUL V. GADOLA

DECLARATION OF GLENDA BLEAU

I, Glenda Bleau, hereby declare and state as follows:

1. This Declaration is being submitted in support of Marketing Displays, Inc's ("MDI") Motion For Summary Judgment relative to trademark infringement.

2. I have been employed at MDI since 1987. I currently am one of the two sales coordinators at MDI in its Traffic Control Products division. Prior to becoming a sales coordinator, I was a customer service representative.

3. As part of my duties and responsibilities at MDI as both customer service representative and sales coordinator, I receive and answer phone calls from customers and prospective customers. The subject matter of these calls range from filling orders for various MDI products to providing information about MDI's products. . My responsibilities also include filling out bid forms and submitting these bid forms on behalf of MDI to various purchasers and prospective purchasers in the traffic control product industry.

4. While fielding phone calls form purchasers and prospective purchasers, I have personally received between five (5) and ten (10) phone calls from prospective purchasers who had called MDI to obtain information concerning a "WindBuster" sign stand.

5. Additionally, on numerous other occasions, I have received phone calls from prospective purchasers seeking information about a sign stand having a name containing the word "wind", but they could not remember the entire name of the sign stand. On other occasions, I have fielded phone calls from prospective purchasers asking for information about the "wind something" sign stand, where the "something" would be a suffix other than "master".

6. I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

Dated: October 10, 1996 /s/ Glenda Bleau
Glenda Bleau

To: Glenda Bleau-MDI TCP

From: Pete Sculley-MDI 8/9/96

Re: An Example of a Bid For "WindBuster" By Traffix

Dear Glenda:

The Following bid is from the city of Dover in the state of Delaware. It is dated 7/7/95. As you can see, they requested bids for the "WindBuster" signstand but they also put "WindMaster no equal" on the same bid. When I contacted the city of Dover.

1) I was referred to Ron Lunt. Line Foreman, who requested the items to be purchased.

Ronald Lunt Foreman 302-736-7071
City of Dover, 860 Buttner Place, Dover, DE 19901

The State of Delaware is unique in that they require signs to be displayed 60' above the ground for all types of work zones. Our WindMaster 4860 has been the standard in Delaware work zones for years.

Mr. Lunt told me that he assumed that the "WindBuster" was simply a less expensive version of the WindMaster. To him the "WindMaster" meant the WindMaster 4860. He knew of no other WindMaster products. He was surprised when I explained to him that the "WindBuster" was not even manufactured by the maker of WindMaster. He was also not aware that the "WindBuster" (holds Sign 18" above ground) was not approved for use in Delaware.

Because he planned to use these stands with roll up signs, I gave him information about our 4850, which the City of Dover eventually purchased through our Delaware dealer, Enterprise Flasher.

I cannot say for sure that this was a misrepresentation on the part of a TrafFix Representative, but I can say that Mr. Lunt was contacted by someone representing TrafFix Products, and that from this contact, he developed the opinion

that "WindBuster" and "WindMaster" were manufactured by the same company.

THE CITY OF DOVER
CAPITAL OF THE FIRST STATE

To: _____

COMPANY: TRAFFIC CONTROL PRODUCTS

FAX #: (810) 488-5700

PHONE #: _____

FROM: Fran Hettinger

COMPANY: City of Dover

ADDRESS: BILL TO 710 William Street, Dover, DE 19901

FAX: (302) 736-7178
(302) 736-7047

CONFIDENTIALITY NOTICE: This facsimile (this page and any accompanying page(s) is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employer or agent responsible for receiving this message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication, or the taking of any action in reliance on the contents of this information, may be strictly prohibited. I you have received this facsimile in error, please notify us immediately by telephone (collect) and mail the original message to us at the above address via the U. S. Postal Service. Thank you.

FROM : PETE SOULLEY-MDI PHONE NO. : 618 261 [illegible]21 P01

FROM MDI 618 489 5788 1995-07-07 16:58 PAGE P.02/02

P3 of 3

JULY 7, 1995

	DESCRIPTION	QUNTY	VENDOR	VENDOR	VENDOR	VENDOR	VENDOR
	WINDBUSTER SIGN STAND W/STEP-N-DROP LEGS AND ROLL UP SIGN BRACKET. WINDMASTER NO EQUAL	6					
	NON-REFLECTIVE ROLL-UP MESH SIGN 48" X 48" "MEN WORKING"	2					
	NON-REFLECTIVE ROLL-UP MESH SIGN 48" X 48" "ONE LANE ROAD AHEAD"	2					
	NON-REFLECTIVE ROLL-UP MESH SIGN 48" X 48" "SHOULDER WORK"	2					
	NON-REFLECTIVE ROLL-UP MESH SIGN 48" X 48" UTILITY WORK AHEAD.	2					
	PLEASE QUOTE PRICE AND DELIVERY ON THE ABOVE MATERIAL. WINDMASTER PRODUCTS NO EQUAL. PLEASE HAVE RETURNED TO ME BY JULY 12, 1995. THANKS, FRAN						

Pat

72

0187

MD000003

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v

TRAFFIX DEVICES, INC.,

Defendant.

Civil Action No. 95-CV-40230
Hon. Paul V. Gadola

DECLARATION OF MARA BITTE

I, Mara Bitte, hereby declare and state as follows:

1. This Declaration is being submitted in support of Marketing Displays, Inc.'s ("MDI") Motion For Summary Judgment relative to trademark infringement.

2. I have been employed at MDI since 1983. In July, 1995, I retired from full time employment and I am presently working two days a week in the purchasing department.

3. From 1983 to 1995, my job titles included sales secretary, sales coordinator and sales supervisor for MDI's Traffic Control Products division.

4. As part of my duties and responsibilities as sales secretary, sales supervisor, and sales coordinator, I fielded phone calls from purchasers, and prospective purchasers. The subject matter of these calls ranged from taking orders to answering questions about MDI' s various products. I also took part in filling out bid forms and submitting our bids to various prospective purchasers.

5. My present responsibilities include working in purchasing and I do not normally answer phone calls from prospective purchasers. However, I fill in and answer phone calls from customers and prospective customers when needed.

6. While fielding phone calls from 1994 to the present, I personally received no less than five (5) phone calls from prospective purchasers inquiring as to whether or not MDI sold the "WindBuster" sign stand.

7. On another occasion, I fielded a phone call from a prospective purchaser who inquired as to whether he was speaking with TrafFix Devices, Inc.

8. In my opinion, purchasers and prospective purchasers of sign stands are typically not very informed purchasers. This is based on my over 13 years experience dealing with purchasers of sign stands.

9. I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

Dated: October 2, 1996

/s/ Mara Bite
Mara Bitte

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v

TRAFFIX DEVICES, INC.,

Defendant.

Hon. Paul V. Gadola
Civil Action No. 95-CV-40230

ANSWER TO DEFENDANT'S COUNTERCLAIMS

NOW COMES Plaintiff, Marketing Displays, Inc., (MDI) by and through its attorneys, BROOKS & KUSHMAN, P.C. and for its Answer to Defendant's Counterclaims, states as follows:

1. Plaintiff admits the allegations contained in Paragraph 1, but avers that its business is not limited solely to the sale of traffic sign stands.

2. Upon information and belief, Plaintiff admits the allegations contained in Paragraph 2.

COUNT I

3. Plaintiff hereby incorporates by reference its response to Paragraphs 1 and 2 as though set forth fully herein.

4. Plaintiff lacks sufficient information or knowledge to either admit or deny whether TrafFix "believes" anything about Plaintiff's newly added Count II. Plaintiff denies the remainder of the allegations contained in Paragraph 4.

5. Plaintiff lacks sufficient information or knowledge to either admit nor deny the allegation contained in Paragraph 5 because it does not know to what "this claim" is referring.

6. Plaintiff lacks sufficient information or knowledge to either admit nor deny the allegation contained in Paragraph 6 as it does not know to what "this claim" is referring.

7. Plaintiff denies the allegations contained in Paragraph 7 for the reason that they are untrue.

8. Plaintiff denies the allegations contained in Paragraph 8 for the reason that they are untrue.

9. Plaintiff denies the allegations contained in Paragraph 9 for the reason that they are untrue.

10. Plaintiff denies the allegations contained in Paragraph 10 for the reason that they are untrue.

11. Plaintiff denies the allegations contained in Paragraph 11 for the reason that they are untrue.

COUNT II

This Count is the subject of Plaintiff's pending Motion to Dismiss pursuant to Rule 12 (b) (6) and therefore, Plaintiff need not answer the allegations contained therein at this time.

WHEREFORE, Plaintiff prays that:

A. Defendant's Counterclaims be dismissed with prejudice.

B. The Court award Plaintiff its costs and attorney fees; and

C. The Court award such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

BROOKS & KUSHMAN P.C.

By: /s/ John A. Artz
John A. Artz (P2479)
Frank A. Angileri (P45611)
John S. Artz (P48578)
1000 Town Center
Twenty-Second Floor
Southfield, Michigan 48075
(810) 358-4400

Attorneys for Plaintiff

Dated: October 29, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

V

TRAFFIX DEVICES, INC.,

Defendant.

Hon. Paul V. Gadola
Civil Action No. 95-CV-40230

DECLARATION OF SEAN NOONE

I, Sean Noone, hereby declare and state as follows:

1. I am submitting this Declaration in support of Marketing Displays, Inc.'s ("MDI") Motion relative to its trademark WINDMASTER.

2. I have been employed at MDI since about 1991 as a sales representative. My present territories include the midwestern and northern United States.

3. As a sales representative, my job responsibilities include, the marketing, promotion, and sale of MDI's various products, including the WINDMASTER sign stands.

4. I market, promote, and sell MDI's products, including the WINDMASTER sign stands at various trade shows, through customer and prospective customer field calls, and also telephone calls.

5. During my tenure as sales representative, I have become familiar with MDI' s various competitors for each of the product lines I sell, including TrafFix Devices, Inc.

("TrafFix"). I am also familiar with the sign stand sold by TrafFix under the mark WINDBUSTER which it sells in competition with MDI.

6. During my job function of attending trade shows and calling on customers and potential customers, I have encountered numerous instances of confusion between MDI's WINDMASTER and TrafFix's WINDBUSTER.

7. Within the last year I have personally encountered in the field, at least one instance of actual confusion per week between MDI's WINDMASTER and TrafFix's WINDBUSTER sign stands (approximately 25 total). They have occurred in various different ways, for example:

a. At various trade shows, where I have had a WINDMASTER sign stand displayed, various people have come up to me and asked if my company manufactured the WINDBUSTER sign stand;

b. On other occasions, where I also had a WINDMASTER sign stand displayed, I have had people come up to me and ask if my company was associated with TrafFix Devices, Inc.; and

c. On other occasions, I have had prospective customers look at either a WINDMASTER sign stand or promotional literature for the WINDMASTER sign stands and tell me that they were already purchasing the WINDBUSTER sign stands.

8. Some of the specific customers and/or prospective customers who I can recall exhibiting confusion were (1) South Dakota Department of Transportation, (2) Northern States Power Utilities (in Minnesota), (3) North Dakota Department of Transportation, and (4) Manitoba Hydro.

9. I also believe that another prospective customer that exhibited confusion between MDI's WINDMASTER sign stand and TrafFix's WINDBUSTER sign stand was the Kansas Department of Transportation.

10. One trade show that I specifically recall prospective customers exhibiting confusion between MDI's WINDMASTER sign stand and TrafFix's WINDBUSTER sign stand was at Northland's (How-To Conference) in Fargo, North Dakota.

11. I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

Dated: November 21 , 1996

/s/ Sean Noone
Sean Noone

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

V

TRAFFIX DEVICES, INC.,

Defendant.

Hon. Paul V. Gadola
Civil Action No. 95-CV-40230

DECLARATION OF LANNY HYDE

I, Lanny Hyde, hereby declare and state as follows:

1. I am submitting this Declaration in support of Marketing Displays, Inc.'s ("MDI") Motion relative to its trademark WINDMASTER.

2. I have been employed at MDI since 1986 as a sales representative. My present territories include the western United States.

3. As a sales representative, my job responsibilities include, the marketing, promotion, and sale of MDI's various products, including the WINDMASTER sign stands.

4. I market, promote, and sell MDI's products, including the WINDMASTER sign stands at various trade shows, through customer and prospective customer field calls, and also telephone calls.

5. During my tenure as a sales representative, I have become familiar with MDI's various competitors for each of the product lines I sell, including TrafFix Devices, Inc. I am also familiar with the sign stand sold by TrafFix under the mark WINDBUSTER which it sells in competition with MDI.

6. During my tenure as sales representative I have become acquainted with an individual named Pete Freeman. Mr. Freeman owns National Barricade which is a potential customer of MDI and is familiar with the WINDMASTER product.

7. Within the last six months, Mr. Freeman was interested in selling the WINDMASTER product. I told Mr. Freeman that we would work on a trial basis and the first thing I had wanted him to do was to call on a customer of MDI's which had previously been a buyer of the WINDMASTER sign stands.

8. The customer was Washington Water Power and I had wanted Mr. Freeman to call on them because I had not been in too much contact with them over the past year or so and I wanted to reestablish a relationship.

9. Mr. Freeman called me on Wednesday, November 13, 1996, to let me know that he has followed up with Washington Water Power on behalf of MDI. When Mr. Freeman called he left a message on my machine and stated that "I followed up with Washington Water Power regarding the WINDBUSTER sign stands" or words to that effect.

10. In my opinion, Mr. Freeman was confused as to the names of the products and obviously, equated the two.

11. I declare that all statements made in this declaraton are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v.

TRAFFIX DEVICES, INC.,

Defendant.

Hon. Paul V. Gadola
Civil Action No. 95-CV-40230

DECLARATION OF RON LUNT

I, Ron Lunt, hereby declare and state as follows:

1. I am submitting this Declaration in support of Marketing Displays, Inc.'s ("MDI") Motion relative to its trademark WINDMASTER.

2. I work for the City of Dover, Delaware as the Transmission and Distribution Manager, and have been employed there since 1988.

3. As the Transmission and Distribution Manager, my responsibilities include, inter alia, determining what products we need in the field, preparing bids based on our desired specifications, and sending them to manufacturers of products that meet our specifications for bids.

4. While I have been the Transmission and Distribution Manager, I have only purchased and used wind resistant sign stands manufactured and sold by MDI, namely WINDMASTER sign stands.

5. When I began my employment with the City of Dover, Delaware, we had WINDMASTER sign stands on

hand and they were being used in the field by our crews. I was familiar with their look and operation and pleased with their performance.

6. In late June or early July, 1995, I helped prepare a bid sheet soliciting bids for sign stands and it was sent out on July 7, 1995. (One page of the bid is attached as Exhibit 1 to my declaration.) In preparing the bid, I told my purchasing agent to solicit bids for MDI's WINDMASTER sign stand as that was what I was familiar with. Somehow, the specifications for the WINDBUSTER sign stand ended up on the bid sheet.

7. When this was first brought to my attention, after the bid had been sent out, I assumed that the WINDBUSTER was just another product being offered by MDI in its sign stand line.

8. My specifications indicated that MDI Traffic Control Products was the only manufacturer allowed and thus, the language, "WINDMASTER NO EQUAL" and "WINDMASTER PRODUCTS NO EQUAL" was placed in the bid sheet. This language was intended to convey my opinion that the WINDMASTER sign stands were the best sign stands on the market. This was based on my experience in using the WINDMASTER product for the past 7 years.

9. I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

Dated: December 3, 1996

Ron Lunt
T & D Manager
/s/ City of Dover
Ron Lunt

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

vs

TRAFFIX DEVICES, INC.

Defendant.

Case No.: 95-CV-40230
HONORABLE PAUL V. GADOLA

DECLARATION OF JOHN SARKISIAN

I, John Sarkisian, hereby declare and state as follows:

1. I am submitting this Declaration in support of Marketing Displays, Inc.'s ("MDI") Motion For Summary Judgment relative to the trade dress issue.

2. I have been employed at MDI since 1982. I am presently Sales Manager for MDI's Traffic Control Products (TCP) division. Prior to becoming the Sales Manager, I have been a Field Sales Manager and a Regional Manager of sales of MDI. I also have worked in inside sales for various MDI products.

3. I am currently in charge of the sales and marketing of all of MDI's traffic control products. As a result of my experience with MDI, I am familiar with all of MDI's TCP products and with their sales and promotional expenses. In particular, I am knowledgeable about the amount of sales of MDI's WINDMASTER and STEELMASTER products and

the amount of money that has been spent on sales and advertising for those products.

4. As part of my present responsibilities, I regularly attend trade shows and call on existing and potential customers for MDI's traffic control products. Consequently, I am familiar with all of the competition in the TCP sign stand industry.

5. MDI sells spring-mounted wind resistant sign stands under the names WINDMASTER and STEELMASTER. MDI manufactures these wind resistant sign stands and has been manufacturing and selling the WINDMASTER TCP sign stand since the mid-1970's and the STEELMASTER sign stand since the mid-1980's.

6. A current MDI brochure showing both the WINDMASTER and STEELMASTER products is attached hereto as Attachment 1.

7. The WINDMASTER and STEELMASTER products each utilize a pair of closely spaced vertical coil springs and are virtually identical in design. The only differences are that the WINDMASTER sign stands have aluminum legs and an aluminum vertical upright, while the STEELMASTER sign stands have steel legs and a steel vertical upright - and are painted orange.

8. Since the mid-1970's, MDI has spent, on average, tens-of-thousands of dollars each year advertising the WINDMASTER (20 years) and STEELMASTER (10 years) TCP sign stands. The advertising has been through literature, customer contacts, direct mailings, and trade shows. Virtually all of this advertising and promotion has depicted or shown the unique look and design of these sign stands (as evidenced by Attachment 1).

9. MDI has sold the WINDMASTER and STEELMASTER wind resistant sign stands in the traffic control industry each year since the mid-70's and mid-80's, respectively, and has been using the unique product design

exclusively in that field for over 20 years. MDI sold approximately $2,000,000 of these sign stands in 1996 and has averaged over $1,000,000 in sales per year since the mid-1970's. In total, to date, MDI has sold over $20,000,000 of the TCP WINDMASTER and STEELMASTER sign stands.

10. MDI's WINDMASTER and STEELMASTER TCP sign stands are sold by direct and distributor sales to contractors, government entities, utilities, and police and fire departments. Additionally, based on my experience, these purchasers typically are not very informed about purchasing decisions and take little time in making their purchasing decisions.

11. MDI's WINDMASTER and STEELMASTER TCP products have enjoyed substantial commercial success and their design and the products themselves have developed substantial good will and recognition in the TCP industry.

12. The WINDMASTER and STEELMASTER sign stands directly compete in the marketplace with TrafFix Device's WINDBUSTER sign stand. Other competitors that manufacture and/or sell resiliently-mounted, wind-resistant sign stands that compete in the marketplace with the WINDMASTER and STEELMASTER sign stands are: (a) Eastern Metal of Elmira with its flat leaf spring sign stand; (b) Dicke Tool Co. with its horizontal torsion spring sign stand; (c) Sign-Up with its single spring "PowerCell" sign stand; (d) Services and Materials with its boxed single spring sign stand; (e) Work Area Protection with its sign stand with a pair of 45° angled springs; and (f) Korman Signs with its sign stand with a pivoting upright and a "teeter-totter" counterbalance spring mechanism.

13. With their different resilient mechanisms, these other competitive wind-resistant sign stands differ in design and appearance from the WINDMASTER/STEELMASTER design and appearance. All of these sign stands of others, however, are competitive in the marketplace, particularly with respect to factors such as quality, cost and/or wind performance. Not only has MDI

lost sales of its WINDMASTER and/or STEELMASTER sign stands to these companies on numerous occasions, but numerous governmental agencies have issued specifications which only cover one or more of these competitive designs and do not cover the WINDMASTER or STEELMASTER products with a pair of upright coil springs.

14. Still other competitive wind-resistant sign stands which compete in the marketplace with the WINDMASTER and STEELMASTER TCP sign stands do not utilize a resilient mounting to accomplish a wind-resistant function. Instead, these sign stands utilize vinyl sign panels with flexible cross-braces which bend and "spill" the wind in windy conditions. These sign stands are sold in competition with the WINDMASTER and STEELMASTER sign stands, as well as the sign stands identified above in Paragraph 12. In this regard, MDI has also lost sales of its WINDMASTER and STEELMASTER sign stands to customers who have instead purchased these non-resiliently mounted sign stands with flexible sign panels.

15. The success of the WINDMASTER/STEELMASTER product line has spawned some competitors, such as Eastern Metal and TrafFix Devices, to copy MDI's dual-spring trade dress. In 1995, MDI accused Eastern Metal of trade dress infringement and the controversy was settled when they paid MDI for their past infringement and entered into a royalty-bearing License Agreement for use of the trade dress in the future. A copy of the Trade Dress License Agreement is attached hereto as Attachment 2.

I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment, or both, under 28 U.S.C. §1746.

Dated: 2-27-97

/s/ John Sarkisian
JOHN SARKISIAN

TRADE DRESS LICENSE AGREEMENT

THIS AGREEMENT is effective the 1st day of July, 1996 and is made by and between

MARKETING DISPLAYS INTERNATIONAL
38271 West Twelve Mile Road
Farmington Hills, Michigan 48331
(hereinafter referred to as "MDI")

and

EASTERN METAL OF ELMIRA, INC.
1430 Sullivan Street
Elmira, N.Y. 14901
(hereinafter referred to as "EASTERN METAL")

1. Introduction. MDI is the owner of all right, title and interest in the following trademarks, trade dress, and product configuration fights (hereinafter the "MDI Trade Dress"):

> A sign stand with a pair of vertically-oriented closely spaced coil springs situated on a narrow base, an upright member attached to the top of the springs, a plurality of ground engaging leg members attached to the base and angled outwardly therefrom, and a sign member being positioned on or otherwise attached to the upright member.

MDI and EASTERN METAL are willing to enter into an arrangement on the terms set forth in this Agreement such that MDI will grant to EASTERN METAL a non exclusive right and license under the MDI Trade Dress to make, use, advertise and sell sign stands incorporating such Trade Dress. The parties also wish to resolve and settle the pending litigation between them: Marketing Displays, Inc. v. Eastern Metal of Elmira (E.D. Mich., C.A. 95-40231).

2. Territory. The territory for which MDI shall grant a license for the Trade Dress to EASTERN METAL is the United States of America, including its territories and possessions, Canada and Mexico.

3. License Grant. MDI hereby grants to EASTERN METAL the non-exclusive right and license under the MDI Trade Dress to make, use, advertise and sell sign stands incorporating such Trade Dress throughout the Territory.

4. Termination of Litigation. Concurrently with entering into this License Agreement, MDI agrees to voluntarily dismiss or withdraw the Trade Dress infringement cause of action in the pending Michigan litigation (E.D. Mich., C.A. 95-40231).

5. Payment of Royalties. EASTERN METAL agrees to pay MDI for the license rights hereunder, a royalty of two percent

(2%) of the Net Selling Price of all sign stands which visibly display such MDI Trade Dress. By way of example and not limitation, current EASTERN METAL products which are subject to payment of a royalty hereunder include the C-400, X-500, X-600, and C-700-series sign stands (such as the C-402, X-500, X-550, X-600, X-650, and C-702 products). These products are shown and/or disclosed in EASTERN METAL's 1995-96 catalog, a copy of which is attached hereto and incorporated herein as Exhibit A.

In this regard, there will be no Trade Dress royalties due on the C-400 and C-700-series sign stands so long as the Patent License Agreement executed concurrently herewith by the parties is still in effect and EASTERN METAL is continuing to pay a patent license royalty to MDI on such products. Once the Patent License Agreement is terminated, however, Trade Dress license royalties on the C-400 and C-700-series sign stands will begin hereunder immediately.

The "Net Selling Price" shall be the actual selling price as sold by EASTERN METAL, less packaging costs, freight charges, returns, sales and other like taxes, if included in the selling price. For purposes of computing royalties, the date of sale shall be the invoice date.

Within 30 days after the end of each quarter of each calendar year, EASTERN METAL shall furnish to MDI a statement showing the total "Net Selling Price" of all licensed devices manufactured by or for EASTERN METAL during the preceding calendar quarter, and EASTERN METAL shall pay the amount of royalties owing at the time said statement is furnished. EASTERN METAL shall pay interest to MDI at the rate of one percent (1%) per month for the period during which any royalty required by this Agreement shall be delinquent.

6. Other Payment. In addition to royalty payments made in accordance with Article 5 above, EASTERN METAL also agrees to settle the trade dress infringement cause of action in the pending Michigan litigation by paying MDI for past use in

the Territory the amount of fifty thousand dollars ($50,000.00). Payment of one-half of this amount will be made concurrent with the execution of this Agreement by EASTERN METAL, and the remainder shall be payable by December 31, 1996. None of the $50,000.00 amount can be set off or used as a credit against any future payments under Article 5.

7. Marking. EASTERN METAL shall place or cause to be placed on all of its sign stands licensed hereunder and on all of its advertising therefor, a clear and appropriate notice that the products contain and/or are licensed under the Trade Dress rights of MDI.

8. Cross-License. As further consideration for the licensing rights hereunder, EASTERN METAL hereby grants a royalty-free non-exclusive right and license to MDI under U.S. Patent No. 4,309,836 to make, use and sell sign stands disclosed and claimed therein. If MDI manufactures, uses or sells sign stands in accordance with the '836 patent, then MDI agrees to place an appropriate patent notice on such sign stands, such as "Licensed under U.S. Patent No. 4,309,836".

9. Record Keeping. EASTERN METAL shall keep true and accurate records and books of account containing all information required for the computation and verification of the sums to be paid pursuant to Article 5 of this Agreement. EASTERN METAL agrees to permit such books and records to be examined, from time to time and during reasonable business hours, to allow verification of the statements and sums, such examination to be made at MDI's expense by an independent auditor. The report of the auditor shall be confined to statements concerning the accuracy of the information, computation, sums and statements.

If it is found that EASTERN METAL underreported sales under Article 5 by five percent (5%) or more, then EASTERN METAL agrees to pay for the audit.

10. Term, Termination and Default. This License Agreement and license granted hereunder to EASTERN METAL can be

terminated by EASTERN METAL upon six (6) months notice in writing to MDI.

Upon termination of this Agreement, EASTERN METAL agrees immediately thereafter to cease using the MDI Trade Dress. The parties agree that one way that this can be accomplished is by eliminating a pair of closely spaced vertical coil springs positioned between the base member and the sign member from the sign stands.

If EASTERN METAL, at any time, defaults in the payment of any royalty or the making of any report or the keeping of books and records as provided for herein, refuses access to its sales books and records, makes an incorrect report or an unauthorized assignment, fails to maintain reasonable quality standards, or commits any other material breach of any covenant or condition contained herein, then MDI shall have the right to terminate this Agreement upon thirty (30) days written notice of its intention to do so, provided however that EASTERN METAL shall have the right to remedy such breach within said thirty (30) day period to prevent this Agreement from being canceled. In addition, if EASTERN METAL becomes insolvent, files for bankruptcy or makes an assignment for the benefit of creditors, or institutes a similar arrangement, or if a receiver is appointed for EASTERN METAL, then MDI shall have the right to immediately terminate this Agreement.

Termination of this Agreement will not affect rights accrued under this Agreement prior to termination. Upon termination of this Agreement, the rights of the parties under any provision of this Agreement, that by their terms or intent survive termination of this Agreement, will remain in effect. In addition, a termination by MDI shall not have the effect of or be construed as a waiver of any royalties or rights of MDI hereunder accrued at the time of such termination.

If the MDI Trade Dress is held invalid or unenforceable by a trial court and that decision is being appealed by MDI, then all royalties due under this Agreement from the date of

the trial court's decision, until the date of the Court of Appeal's decision, shall be placed into an interest bearing escrow account by EASTERN METAL at EASTERN METAL's attorney's office. If the trial court's decision is reversed by the Court of Appeals or MDI's Trade Dress is otherwise held valid and enforceable by the Court of Appeals, then the escrowed royalties (plus interest) shall be immediately paid to MDI, and EASTERN METAL shall immediately provide a full reporting and accounting to MDI relative thereto. If the trial court's decision is upheld or affirmed by the Court of Appeals relative to the invalidity or unenforceability of MDI's Trade Dress, and MDI has exhausted all of its rights relative to reconsideration, further appeals, writs of certiorari and the like, then the escrowed royalties (plus interest) shall be immediately paid to EASTERN METAL.

If the MDI Trade Dress is held invalid or unenforceable by a court of final jurisdiction, any future obligations of Eastern Metal under this Agreement (i.e., other than accrued rights and obligations, such as payment of royalties) shall be deemed null and void.

11. Most Favored License. During the term of this Agreement, if MDI grants a license under the MDI Trade Dress to another on royalty terms different from the terms of this Agreement, then MDI shall notify EASTERN METAL within thirty (30) days and provide EASTERN METAL with a copy of the license agreement. EASTERN METAL then will have the option to incorporate such different terms in this Agreement, effective from the date of notice.

12. Quality Standards. EASTERN METAL agrees to maintain the quality of sign stands incorporating or utilizing MDI's Trade Dress which are manufactured, used, advertised and/or sold by EASTERN METAL under this Agreement to a level of reasonable quality acceptable to MDI. MDI acknowledges that it has inspected products subject to this Agreement currently manufactured, used, advertised and/or

sold by EASTERN METAL and that those products meet quality standards acceptable to MDI.

13. Independent Contractors. Both parties are independent contractors, and this Agreement does not establish either party as the legal representative of the other for any reason. Neither party has the authority to assume or create any obligation whatsoever, expressed or implied, on behalf of or in the name of the other party, nor to bind the other in any manner.

It is the intention of MDI and Eastern Metal that each party will be responsible for their own intentional acts and active negligence, and will not be responsible vicariously for the active negligence of the other party. Also, if either party incurs liability that is caused by the joint and concurrent negligence of both parties, then MDI and Eastern Metal intend that they will share that liability in proportion to their fault, so that neither party will incur liability in excess of the proportion of the liability caused by that party. Accordingly, MDI agrees to indemnify and hold harmless Eastern Metal and its agents, employees, officers and directors, and Eastern Metal agrees to indemnify MDI and its agents, employees, officers and directors, from any and all liability, charges, claims, costs or losses, including reasonable attorney fees, incurred by Eastern Metal or MDI, respectively, in connection with or arising from an action by a third party, to the extent necessary to carry out the intention of the parties as expressed in this section.

14. Product Differentiation. Notwithstanding the licensing of MDI Trade Dress, EASTERN METAL also agrees to attempt to differentiate its sign stand products frost those of MDI in the marketplace by manufacturing, using, advertising and/or selling sign stands with coil springs which are not black or dark in color and by applying one or more visible labels to its products clearly identifying its products as those of EASTERN METAL and/or USA-SIGN.

The visible labelling requirement(s) of this Agreement will be reasonably interpreted by MDI to mean that the size of

any and all "labels" required hereunder may be compatible with, and in any event need be no larger than, any singular side or surface of a major component of the product to which they are affixed.

EASTERN METAL shall begin utilizing differently colored coil springs, and affixing the appropriate visible label required by this Agreement, within thirty days after the execution of this Agreement, or upon the exhaustion of its remaining inventory of "long-lead" items, such as black coil springs, whichever occurs last, but in all cases no later than 75 days from the signing of this Agreement.

15. Notices. Any notice, request, demand, approval, consent or other communication that a party may be required or permitted to give the other party must be in writing and must be served personally or by prepaid, certified mail at the address of the other party as set forth at the beginning of this Agreement or at such other address as the party has designated by notice in accordance with this Section.

Proof of the mailing of any such document in the manner specified shall constitute prima facie evidence that service has been made on the party to be served as of five (5) days following the date of such mailing.

16. Assignment. No rights of assignment, sub-license or other transfer of rights under this Agreement are granted to EASTERN METAL except (a) as expressly authorized in writing by MDI prior to any such assignment, sub-license or transfer, or (b) to a successor or purchaser of EASTERN METAL or of all of EASTERN METAL's sign stand business.

17. Choice of Law. This Agreement shall be construed in accordance with and governed by the substantive laws of the State of Michigan (and not the conflict of laws rules). Any legal proceeding between the parties must be brought and conducted in a court of the State of Michigan and in the county in which MDI's principal place of business is located or the U.S. Federal District Court for the district within the

State of Michigan where MDI's principal place of business is located, and the parties consent to those courts having jurisdiction over their persons.

18. Costs of Enforcement. Each party will be responsible for the costs incurred by the other party in successfully enforcing the provisions of this Agreement, including reasonable attorneys' fees. If the parties are involved in an action that involves claims by both parties, the prevailing party will be entitled to collect its costs of enforcement from the other party.

19. Waiver. No waiver by either party of any breach, default or violation of any term, warranty, representation, agreement, condition or provision of this Agreement will constitute a waiver of any subsequent breach, default or violation of the same or other term, warranty, representation, agreement, condition or provision of this Agreement.

20. Severability. All provisions of this Agreement are severable, and this Agreement will be interpreted and in force as if all invalid or unenforceable provisions were not included and all partially valid and enforceable provisions will be interpreted and enforced to the extent that they are intelligible, valid and enforceable.

21. Entire Agreement; Modification. This Agreement constitutes the entire agreement between the parties concerning the matters covered, and supersedes all prior negotiations, understandings, representations and agreements, whether oral or written. This Agreement may not be modified except by a writing executed by officers of both parties.

22. Successors and Assigns. The provisions of this Agreement will be binding on and will inure to the benefit of the parties and their successors and assigns.

23. Publicity. Each party agrees that it will not issue any press, public or trade releases or publications regarding the terms and conditions of this Agreement or the settlement of the present controversy between the parties.

24. Mutual Release. Each of the parties hereto, including each of their successors and assigns, forever release, remise and discharge the other party hereto, including each of their affiliates, subsidiaries, directors, officers, agents, employees, customers, attorneys, successors and assigns, from any and all claims, and causes of action of any kind or nature, without limitation, which each may have had against the other based upon any fact or matter known prior to the effective date of this Agreement.

25. Execution. MDI and EASTERN METAL agree that this document may be executed in two (2) or more counterparts, each of which will be deemed an original.

The parties have executed this Agreement on the date set forth next to their signatures. The effective date of this Agreement will be the date set forth at the beginning of this Agreement.

MARKETING DISPLAYS INTERNATIONAL

Date: 12/16/96 By: /s/ Aram H. Najariah
Chief Operating Officer

EASTERN METAL OF ELMIRA, INC

Date: 12/26/96 By: /s/ Michael Knapp
President

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

- vs -

TRAFFIX DEVICES, INC.

Defendant.

Case No.: 95-CV- 40230
HONORABLE: PAUL V. GADOLA

DECLARATION OF DAVID U. HILLSTROM

David U. Hillstrom hereby states as follows:

1. I am a design engineer at Marketing Displays, Inc. in Farmington Hills, Michigan ("MDI"). I live in Novi, Michigan and have worked for MDI since 1967.

2. I worked on the development of the original business-type "WINDMASTER" sign stand that was invented by Robert Sarkisian at MDI in the late 1960's. That sign stand had a pair of widely spaced coil springs, a pair of elongated parallel leg members, and an upstanding rectangular sign attached to the springs. A drawing of that sign stand is designated "A" in the attached Attachment 1. The WINDMASTER sign stand was used predominately by businesses such as gas stations, drug stores and the like, to advertise products and prices on the sidewalks outside their establishments.

3. In the mid-1970's, I helped develop MDI's traffic control type "WINDMASTER" sign stand. This first generation of TCP (traffic-control product) sign stands had a pair of widely spaced coil springs, a pair of steel U-shaped leg members, and a steel inverted V-shaped upright on which a diamond-shaped traffic-control sign was positioned (see "B" in Attachment 1). The two U-shaped leg members folded-up for transport and storage and workmen could easily move the sign stand by hanging it on their shoulders. MDI sold a significant number of these sign stands during the 1975-77 time period and they were well received in the marketplace.

4. In about 1977, I helped design the second generation of "WINDMASTER" TCP sign stands. This redesign of MDI's TCP sign stands had a pair of closely-spaced coil springs, four individual leg members forming an X-shape, and a single vertical upright on which a diamond-shaped traffic-control sign was positioned (see "C" in Attachment 1). The four leg members folded up individually adjacent the upright for transport and storage of the sign stand.

5. Although numerous minor changes have been made through the years to the "WINDMASTER" TCP sign stand, such as improved leg locking and release mechanisms, telescopic leg members and improved sign brackets, the basic "look" and design of the second generation of TCP sign stands shown in "C" in Attachment 1 has remained the same from 1977 to date.

6. The changes from the first generation of TCP sign stands ("B") to the second generation ("C") were based on several factors including making a better looking and more aesthetically pleasing sign stand. Although the first generation sign stand had better wind performance than the second generation sign stand, it was bulkier and looked "old fashioned." The second generation sign stand used aluminum leg members and an aluminum vertical upright to make it lighter in weight, and had a smaller base mechanism which made it more compact for storage and transport. The skewed

or angled leg members in the X-shape or configuration also added a new "look" to the final product that was not present in any other competitive sign stand.

7. The second generation of "WINDMASTER" TCP sign stands were very popular with customers and sold extremely well in the marketplace. The customers were pleased with the new "look", as well as the wind performance and improved storageability.

8. MDI could have redesigned the first generation "WINDMASTER" TCP sign stand in many different ways in order to provide a lighter and more compact sign stand which had satisfactory wind performance. For example, other types of spring members and mechanisms could have been utilized which would have provided a more compact design than two side-by-side coil springs. The spring mechanism could have utilized a single spring, a flat leaf spring, a horizontally-disposed torsion spring, or a rubber resilient member. These alternate designs would have been comparable in weight, quality and cost to the two closely-spaced coil springs selected by MDI, but would have provided a different "look" and aesthetic appearance. Also, other types and designs of vertical upright members and leg members (such as U-shaped) could have been selected, and a different number of legs (3, 6, solid, etc.) could have been provided - each of which would have provided a different "look" and could have provided comparable weight, stability, quality, wind resistance and/or cost of the resultant sign stand.

9. In the mid-1980's (circa 1985-86), MDI developed a less expensive version of the TCP WINDMASTER sign stands which utilized steel components rather than extruded aluminum components. This was called the "STEELMASTER" sign stand and was identical in shape and design to the WINDMASTER TCP sign stands with - the only difference being coloration. The four skewed leg members and vertical upright member of the "STEELMASTER" sign stands were painted orange.

10. Since the time that MDI developed its successful "WINDMASTER" wind-resistant sign stand, numerous competitors in the TCP sign stand industry developed different looking competitive alternatives - most of which are comparable in wind performance, quality and/or cost to the WINDMASTER sign stand. This shows that it is not necessary to copy the "look" and coil spring design of the WINDMASTER/STEELMASTER sign stands in order to be competitive in the marketplace. Moreover, many of these alternative competitive sign stands are sold at lower prices in the marketplace and many have taken sales away from MDI.

11. Examples of these different looking competitive TCP wind resistant sign stands include the following (all of which are depicted in Attachment 2):

a. The Sign-Up sign stand which utilizes a single extension-type coil spring in an enclosed container on the vertical upright (called "PowerCell");

b. The Dicke Tool sign stand which utilizes a horizontally disposed torsion spring mechanism (called "Dynaflex);

c. The Eastern Metal of Elmira sign stand which utilizes a flat leaf spring resilient member (called "C-Stand");

d. The Work Area Protection sign stand which utilizes two springs set at 45° angles - one in front and one in back of the vertical upright (called "Stable Stand");

e. The Korman Signs sign stand which utilizes a "teeter-totter"-type of counterbalanced spring mechanism with a pivoted vertical upright (called "flexible spring action"); and

f. The Services & Materials sign stand which utilizes a single compression-type coil spring in a

rectangular box on the vertical upright (called "Quadra Flex").

12. There also are several other types of wind-resistance TCP sign stands that are marketed and sold in competition with the resiliently mounted MDI and competitive sign stands described above, and which do not utilize a spring or resilient member on the upright. Instead, these non-resilient type of sign stands utilize a roll-up sign with flexible cross-brace members which bend and flex in the wind - as depicted in Attachment 3. Companies which market this type of sign stands include Sign-Up, TrafFix Devices and MDI (TrafFix calls its version the "TrafFix sign stand"). These sign stands are lighter and less expensive than the MDI WINDMASTER/STEELMASTER sign stands and provide competitive wind performance, quality and cost - and yet have a completely different look and aesthetic appearance. They also have secured significant sales in the marketplace - and have taken sales away from the resiliently mounted sign stands identified above.

13. The MDI WINDMASTER/STEELMASTER sign stands have a unique and identifiable look and aesthetic appearance in the marketplace. Over the years, customers and competitors have come to know that "look" and recognize it either as the WINDMASTER and/or STEELMASTER design, or as a product of MDI. The look and design of the WINDMASTER and STEELMASTER sign stands have become identifiable as a product of MDI.

14. Over the last 10-20 years, MDI has extensively advertised and provided the TCP WINDMASTER (20 years) and STEELMASTER (10 years) sign stands and exhibited and presented them at numerous trade shows in each of those years. The sales of these sign stands have been substantial each year during that period of time and the sign stands are still in wide use and demand today.

15. The success of the WINDMASTER and STEELMASTER TCP sign stands have caused competitors to

copy them. Eastern Metal of Elmira came out with an identical product and when challenged by MDI, paid for their past usage and entered into a royalty-bearing license agreement for the future. The current defendant, TrafFix Devices, has also copied the WINDMASTER/STEELMASTER design. Each of these companies also market and sell sign stands which look different, have satisfactory wind performance and which are lighter and less expensive than the WINDMASTER and STEELMASTER sign stands. In my opinion, the copying by Eastern Metal and TrafFix Devices show the recognition that competitors have for the MDI "look" and its success in the marketplace.

16. The customers, channels of trade and channels of distribution for the TCP sign stands of MDI and all of the competitive sign stands (as depicted in Attachments 2 and 3), are the same. All of these products are sold to the same customers and end users.

The above statements are believed to be true and accurate to the best of my personal knowledge and belief.

/s/ David V. Hillstrom
DAVID U. HILLSTROM

Dated: Feb. 27, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

-vs-

TRAFFIX DEVICES, INC.

Defendant.

Case No. 95-CV-40230

Hon. Paul V. Gadola

The Deposition of JACK KULP was taken in the above-entitled cause before me, Sylvia A. Doyle, a Court Reporter (CSR-1418) and Notary Public for the County of Oakland, State of Michigan, acting in the County of Oakland, at Reising, Ethington, Barnard & Perry, 201 West Big Beaver Road, Suite 400, Troy, Michigan, on Monday, August 5, 1996, commencing at or near the hour of 1:15 p.m.

APPEARANCES:

MR. JOHN A. ARTZ
MR. JOHN S. ARTZ
Brooks & Kushman
1000 Town Center
22nd Floor
Southfield, MI 48075
(810) 358-4400
Appearing on behalf of the
Plaintiff.

DOYLE & DOYLE
(810) 540-9888

– – –

JACK KULP

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

MR. ARTZ: Let's let the record reflect that --

– – –

EXAMINATION

BY MR. ARTZ:

Q Well, first of all, state your full name and address for the record Mr. Kulp.

A Business address or home address?

Q Home.

A Jack H. Kulp, 26871 Canyon Crest Road, San Juan Capistrano, California 92675.

Q And how old are you?

A 59.

Q And you work at TrafFix Devices?

A TrafFix; T-r-a-f-f-i-x Devices, Inc.

Q And what is your position there?

A President, owner, principal owner.

MR. ARTZ: Let us let the record reflect that Mr. Kulp is present here today pursuant to Notice of Deposition filed on behalf of the plaintiff, Marketing Displays, and also, as I understand it, Mr. Kulp is going to be responsive to some of the -- or all the categories of a Rule 30 (b) (6) deposition which was served on TrafFix Devices.

Jeanne, do you have anything on the Rule 30 (b) (6)?

MS. MARSHALL: That's correct. He has knowledge as to most of the categories set forth in the Rule 30 (b) (6) Notice, if you want to go through them.

I believe, and Mr. Kulp, correct me if I'm wrong, that Mr. Kuczera, Mr. Kulp's partner, is the one that is probably the most knowledgeable regarding marketing --

THE WITNESS: That's

correct.

MS. MARSHALL: --

information.

Also regarding the conception of WindBuster, that would probably also be Mr. Kuczera, although Mr. Kulp has knowledge of that.

As to the remainder of the items set forth in the 30 (b) (6) Deposition Notice, I think Mr. Kulp will be the most knowledgeable or as knowledgeable as Mr. Kuczera, and Mr. Kuczera and Mr. Kulp will be the two most knowledgeable individuals.

MR. ARTZ: So Mr. Kuczera, I take it, will be produced under Rule 30 (b) (6) too as to the topics that he is the most familiar with?

MS. MARSHALL: That's correct. And it's my understanding, pursuant to your arrangement with Mr. Weissenberger that Mr. Kulp's -- excuse me, that Mr. Kuczera's deposition will be going forward this Friday.

MR. ARTZ: That's correct.

* * * * *

[Pages 7-18 omitted]

Siegler -- or of Royal Industries, 1974, '75 Royal Industry stock was acquired by Lear Siegler, I made the transmission and continued to run the signal division of Lear Siegler until September 30th of 1986 at which time my division was sold and I was out of a job.

Q Then you formed TrafFix Devices?

A Ugh-ugh.

Q All right. Did TrafFix Devices continue generally in the same line of business as the signal division of Lear Siegler?

A That's correct.

Q Who was the division sold to?

A Sold to Flexolight, division of Lucan Steel for ten and a half million dollars.

Q How do you spell DICO?

A D-I-C-O. Stood for Dairy Industries Corporation of America.

Q And where were they located?

A Des Moines, Iowa.

Q You said that. How about Royal Industries?

A Well, the headquarters of Royal Industries -- the corporate headquarters was in Pasadena, California. And the corporate headquarters of

* * * * *

[Pages 20-46 omitted]

in the sales of WindMaster sign stands?

A Not personally.

Q Did you ever go out to a customer and meet with them relative to a WindMaster sign stand order or bid?

A No, I don't believe I ever did.

Q As a distributor when you were at Lear Siegler signal division, did you purchase the WindMaster sign stands for then resale to others?

A That's correct.

Q So you had some of the WindMaster sign stands at your facility at Lear Siegler signal division?

A That's correct.

Q You personally saw them at that time?

A Yes.

Q And inspected them, I take it?

A Not personally.

Q You personally saw them?

A I personally saw them.

Q Did you ever see them erected?

A Yes.

Q Are you familiar with the MDI product called

SteelMaster?

A Yes.

Q How long have you been aware of that product?

A Since the Lear Siegler days.

Q Did Lear Siegler distribute the SteelMaster sign stand as well?

A Yes, that's my recollection.

Q What are the similarities and differences of the WindMaster and the SteelMaster sign stands of Marketing Displays?

A Well, the WindMaster sign stand is basically aluminum legs and uprights with two springs and a base plate.

The SteelMaster is basically steel uprights and steel legs, powder coated a very light orange. Basically performs the same function.

Q The SteelMaster also has two springs mounted on a base plate?

A That's correct. Functional.

Q The differences then between the SteelMaster and WindMaster as you're describing them is that the WindMaster has aluminum legs and uprights while the SteelMaster has steel legs

and uprights and then the WindMaster has aluminum color for its legs and uprights and the SteelMaster has an orange color for its legs and uprights; is that correct?

A That's correct.

Q Otherwise they are basically the same?

A It's my understanding.

Q And Lear Siegler signal division actually purchased the SteelMaster sign stands and then resold them at the same time it was purchasing and reselling the WindMaster sign stands?

A For a short while.

Q The period overlapped; one time you were selling both at Lear Siegler signal division?

A Yes.

Q Were you still selling the SteelMaster sign stands in 1986 when you formed TrafFix Devices?

A I believe so.

MS. MARSHALL: For the record, when you said "you" in that question, you were referring to Lear Siegler; is that correct?

MR. ARTZ: That's correct.

THE WITNESS: Not me

BY MR. ARTZ:

Q Let me rephrase it. Was the Lear Siegler signal division selling the SteelMaster sign stands at the time that you left in 1986 and formed TrafFix Devices?

A Yes, that's correct.

MR. ARTZ: We have been going an hour, let's take a short break.

(Whereupon, a recess was taken from 2:10 to 2:20 p.m.)

BY MR. ARTZ:

Q Let's refer to Exhibit 3, please. You mentioned earlier a TrafFix sign stand.

Is that shown in Exhibit 3 in the inside front cover?

A Yes, the TrafFix stand, not sign stand, but the TrafFix stand is shown on the inside cover of Exhibit 3.

Q It's called a TrafFix sign stand, but that's the TrafFix stand you were referring to earlier in your testimony?

A Yes.

Q And the WindBuster also is on the back page of that same exhibit; is it not?

A One photograph.

Q The answer is yes?

A Yes.

Q Okay. On the TrafFix stand on the inside first cover, it says that the TrafFix stand's tip resistant design effectively spills the wind and holds the sign securely without heavy springs or bulky mast.

Do you know how it spills the wind and in what manner?

A The frame of the sign acts as the resilient member to bend in the wind and then as the wind gust lets up, the sign comes back up to the upright position.

Q What material is the upright made out of?

A The upright?

Q Yes.

A What do you mean the upright?

Q The upright you said that bends.

A The sign frame itself is made out of glass reinforced polyester.

Q This is the actual upright that's attached to

* * * * *

[Pages 52-64 omitted]

A I think that the WindBuster sign stand made of steel is probably a little less expensive in the marketplace than the WindMaster sign stand which is made of aluminum.

Q Do you know that for sure?

A I don't know for sure, but I think that's the case.

Q What products in the marketplace does the WindBuster sign stand compete with?

A The SteelMaster.

Q What other product?

A Eastern Metal sign stand, Elmira. S & S sign stand; Skip and Smith I think the S & S stands for. Dickie Tool sign stand. Sign-Up Corporation sign stand. Korman Signs sign stands, Virginia. And Work Area used to have a sign stand, I don't know that they still have them.

Q That's Work Area Protection?

A Yes.

Q Korman is spelled K-o-r-m-a-n?

A Yes

Q Sign up is S-i-g-n, hyphen, U-p, capital U?

A Yes.

Q And Dickie is D-i-c-k-i-e?

A I think it's D-i-c-k-e. I'm not sure of the spelling of that.

Q And --

A Bone Safety Sign, that's another one.

Q And Eastern Metal, the full name of that company is Eastern Metal of Elmira?

A That's my understanding.

Q That's Elmira, New York?

A That's my understanding.

Q What product of these companies does the WindBuster compete with?

A Competes with their rigid sign holders.

Q All these companies have a wind resistant sign holder that has some type of spring mechanism in it?

A That's my understanding.

Q So any one of these sign stands of these companies have a wind resistant sign stand with a resilient member that competes with the WindBuster?

A That's my understanding.

Q Wouldn't that hold true then for the WindMaster sign stand as well of Marketing

Displays?

A In that it is a resilient sign stand, yes, the higher price -- the higher level sign stand.

Q Are WindBuster--aren't the WindBuster. Let me start over again.

Aren't the WindBuster sign stands sold to the same customers that the WindMaster sign stands are sold to?

A Some of them I would imagine.

Q The same prospective customers; the same end-users would use the WindMaster and the WindBuster?

A Potentially.

Q And the same potential customers would use the WindBuster sign stands and the SteelMaster sign stands?

A Probably.

Q Okay. And the same potential end-users would also use the rigid sign holders with resilient members of the other companies you mentioned; Eastern Metal, S & S, Dickie, Sign-up, Korman, Work Area Protection and Bone Safety; is that correct?

A Ask the question again. I didn't track it.

Q Okay. And the same potential end-users would also use the wind resistant, resilient sign stands of Eastern Metal, S & S, Dickie, Sign-up, Korman, Work Area Protection and Bone Safety?

A Could use.

Q Yes. In order to be competitive with your WindBuster product?

A Yes.

Q All of these products are used in the traffic control--

A Work zone.

Q Traffic control work zone, okay.

And they have the same function of warning traffic or directing traffic?

A Yes.

Q And all of these resilient signs are sold to the same groups of end-users that you referred to earlier for the WindBuster sign?

A Do you mean sign stands?

Q Sign stands, yes.

A Ask it again, you lost me.

Q Have the wind resistant, resilient sign stands

of these companies you just mentioned; Eastern, S & S, Dickie, Sign-Up, Korman, Work Area, Bone Safety, as well as TrafFix Devices and MDI, sold to the same general classes of customers that you mentioned earlier, namely, distributors, state agencies and contractors?

A I have no way of knowing how and to whom all of my competitors sell their stands to, I just don't know that.

Q Potential end-users would be the same three groups of companies for all of these sign stands, wouldn't they?

A I guess they could be, but I have no way of knowing whom they sell their sign stands to. There may be others, they may be totally different, I just don't know. I don't have access to that information.

Q When the signal division sold its WindMaster and SteelMaster sign stands, did it sell to distributors, state agencies and contractors?

A We sold to distributors. I do not believe we ever sold to state agencies or contractors.

Q Did you know whether Marketing Displays was selling to state agencies or contractors on

* * * * *

[Pages 70-90 omitted]

in any other way other than your brochures and catalogue and trade shows?

A No, we don't -- no, no.

Q Are you familiar with a TrafficMaster sign stand?

A Yes, I am.

Q Who sells that product?

A MDI.

Q Do you know who that's sold to?

A Well, I have no way of knowing MDI's sales, but it was my understanding that it was targeted towards the fire safety, public utility market. Fire safety and police -- emergency vehicle and public utility market.

Q Do you sell any WindBuster sign stands to that market?

A No, I don't believe so.

Q Do you know what criteria that your customers use in buying or selecting one sign stand over another?

A I have a pretty good idea.

Q Okay. What criteria?

A Durability, price, simplicity of use, availability, freight and delivery conditions

and terms, terms of sale, and performance, if I didn't say that.

Q No, you did not.

Are any of these more important than the other?

A I think on a WindBuster sign stand simplicity of use is probably as salient as any -- more salient than any other factor given reasonableness and price comparison.

Q So simplicity of use stands the WindBuster sign stand out from your competitors?

A From all of them.

Q Yours sign stand is easier to use; simpler to use than the others?

A Yes.

Q Is its wind performance any better or less than your competitors?

A Comparable.

Q Is durability comparable or any better or less?

A Which competitor?

Q Marketing Displays.

A Comparable.

Q How about Eastern Metal?

A Better

Q S & S?

A Better.

Q Dickie Tool?

A Better.

Q Sign-Up?

A Better.

Q Korman?

A Better.

Q Work Area Protection?

A Don't know what they got today.

Q And Bone Safety?

A Better.

Q How about price; how does your price compare with your competitors?

A Which one?

Q All right. MDI; Marketing Displays?

A Which sign stand?

Q WindMaster.

A Probably better, but not certain.

Q SteelMaster?

A Comparable.

Q How about the Eastern Metal, Elmira sign stand?

A Which model?

Q Is it comparable to any of their models?

A Yes.

Q Which ones?

A The one they sell the most of, I guess, I'm not sure what that is. We are comparable to Eastern Metal.

Q And Dickie Tool?

A Comparable.

Q Sign-Up?

A Comparable.

Q Bone Safety?

A Comparable.

Q And Korman and S & S?

A Comparable in both those.

Q Any of those sell aluminum sign stands, to your knowledge?

A Which company?

Q Any ones I mentioned; Eastern Metal, S & S, Dickie, Sign-Up, Korman, Work Area Protection and Bone Safety?

A Why don't you ask me one at a time and I'll answer them one at a time.

Q Eastern Metal?

A They make an aluminum sign stand.

Q Does that compete with your WindBuster sign stand?

A I guess.

Q How about S & S?

A They make an aluminum sign stand.

Q Does it compete with your WindBuster sign stand?

A No.

Q Dickie Tool?

A I'm not certain about Dickie Tool.

Q How about Sign-Up?

A Sign-Up does not -- I do not believe Sign-Up makes an aluminum sign, at least not recently.

Q How about Korman?

A Korman does not make an aluminum sign, I understand.

Q Does it compete with the WindBuster sign stand?

A Yes.

Q Work Area Protection?

A I'm not sure about Work Area, I'm not positive where they are.

Q How about Bone Safety?

A Yes.

Q Does that compete with the WindBuster sign stand?

A Yes.

Q Did you ever receive any complaints from customers relative to your WindBuster sign stand?

A No.

Q Not one in the whole two years?

A It's been a very good performing product.

Q Did you ever hear about complaints of any of the sign stands of your competitors?

A Yes.

Q How do you receive those complaints; by word-of-mouth, by letter, by telephone?

A Word-of-mouth.

Q Where did you hear those?

A From customers.

Q I thought you didn't have any dealings directly with customers.

A I don't mean I hear about them from customers. People hear about them from customers and they tell me.

Q And the same way, if you heard any complaints

* * * * *

[Pages 97-103 omitted]

read the whole thing.

BY MR. ARTZ:

Q Okay, read the whole answer.

MS. MARSHALL: I think the question is on the preceding page.

THE WITNESS: That's Interrogatory 14, but that's not Interrogatory 14 he's asking.

MS. MARSHALL: That's the answer:

(Whereupon, discussion off

the record.)

THE WITNESS: Now, will you ask me your question? I've read the Interrogatory.

BY MR. ARTZ:

Q Can I see it please?

You agree with the statement that TrafFix Devices knew that Marketing Displays, Inc., SteelMaster and WindMaster sign stands were well received in the industry?

A I agree with that statement.

Q You agree with the rest of Interrogatory

* * * * *

[Pages 105-111 omitted]

Q How about the Dickie Tool sign stand with a horizontal spring?

A Doesn't work well.

Q You considered that?

A Considered it and rejected it.

Q And Sign-Up has it's --

A Power cell. Considered it and rejected it.

Q All three of those products you just mentioned; the Eastern Metal flat spring, Dickie Tool horizontal spring and the Sign-Up power cell, they are all products which compete in the marketplace with the WindBuster sign stand, are they not?

A After a fashion.

Q They do compete?

A Yes.

Q Do you still have any of the sign stands on hand?

A I don't know that we have them any longer. We have a couple, but -- '

Q Where would they be; where are they? i

A Some are here, some are in California.

Q All right. How many do you have here?

A Two.

* * * * *

[Page 113 omitted]

recollection.

Q And who was involved with you in the selection process?

A Basically me.

Q Mr. Kuczera, was he involved too?

A We talked about it; Walt and myself.

Q After you decided what the design should be, what was the next step?

Did someone draw it up?

Did you take it to a manufacturer to get the parts made?

What did you do?

A We sent -- we made some drawings and we sent the -- we sent one of the competitive sign stands to our -- to our man in Korea and we -- at the same time that we were doing that we were doing some preliminarily tooling that was required for long lead time items and said this is the way that we basically want the sign stand to perform and we said we want to make one similar to this.

Q You actually sent a sign stand to them?

A Yes, that's correct.

Q Was it the WindMaster?

A It was a WindMaster.

Q Was it a SteelMaster?

A It was a WindMaster only. But we had already decided on different size tubing, on a different leg configuration, deployment configuration and different rigid and roll-up sign holders.

Q And then what was the next step? Did he send a prototype to you or did you start manufacturing --

A We began to do the tooling and ultimately resulted in a prototype to evaluate.

Q How close was the prototype to what's shown in this WindBuster exhibit?

A Very close except that we had initially decided on a different leg deployment configuration and we had some coil winding -- spring winding problems to solve. Our springs, we thought, were too soft.

Q Were the springs out-sourced? Did you have those manufactured specifically for you?

A I don't understand that question.

Q Let me strike that.

Did you just go buy springs

* * * * *

[Pages 116-148 omitted]

Q Let me ask you one question that really isn't confidential but I think I will ask you because I saw it in my note here.

On these competitive bid situations, there are certain people at the state agency that TrafFix Devices is dealing with?

A That's correct.

Q Do you have any knowledge of how many products these people in the state agency deal with other than sign

A Oh, thousands, thousands, thousands -- well, many products.

Q They would be the main buyers for the state agency for all of its products then?

A Some states have specialized buyers that deal in certain commodities and other groups of

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

vs.

TRAFFIX DEVICES, INC.,

Defendant.

Case No. 95-CV-40230

Deposition of: JOHN D. MC KENNEY
Taken On: January 15, 1997

Reported by: Judy L. Gruber, CSR No. 2828, RPR
Certified Realtime Reporter

JOHN D. MC KENNEY,

called as a witness by and on behalf of the plaintiff, and having been first duly sworn by the Certified Shorthand Reporter, was examined and testified as follows:

EXAMINATION

BY MR. JOHN A. ARTZ:

Q State your full name and home address for the record, please.

A John Dill, D-i-1-1, McKenney, M-c K-e-n-n-e-y, P.O. Box 488, Arroyo Seco, A-r-r-o-y-o S-e-c-o, New Mexico, 87514.

MR. JOHN A. ARTZ: The attorneys have some things they want to put on the record. The first thing from the plaintiff's standpoint is that we had scheduled today, as a result of yesterday's depositions, we left three depositions to take today, Mrs. Kulp, Mr. Kulp, and Mr. McKenney. We are not going to take the deposition of Mrs. Kulp, we are going to dispense with that, so we are just going to go with the two depositions, Mr. McKenney and Mr. Kulp today.

And I think that defendant's counsel has a few things she wants to add to that.

MS. MARSHALL: Pursuant to court order, the antitrust claim that was asserted by defendant as a counterclaim was dismissed. It's defendant's position that

* * * * *

[Pages 5-7 omitted]

We will have to talk about as to what exactly we are going to do to make it convenient to ask a couple questions on the trademark issue to record it for posterity issues rather than reconvening the deposition. We will have to do it on a case-by-case basis.

MS. MARSHALL: We will have to take a look at that. Our position right now is that any issues that are not in the case should not be inquired into at deposition; however, I am certainly willing to discuss some deviations with that. It's not my intent to be uncooperative.

MR. JOHN A. ARTZ: This is off the record.

(Discussion held off the record.)

MR. JOHN A. ARTZ: Let the record reflect Mr. McKenney has been proffered by defendant as an expert on certain of the issues in this case and the defendants have served us with an expert report of Jack McKenney. He is here pursuant to notice as a result of his being designated as an expert witness in this case.

BY MR. JOHN A. ARTZ:

Q Mr. McKenney, what is your occupation?

A Consulting engineer and retired.

Q Would you state -- how old are you?

A 72.

Q How long have you been retired?

A I think we need a possible definition of

* * * * *

[Pages 9-20 omitted]

WindMaster. I have seen WindMaster signs.

Q You have never actually physically seen them at -- one of the physical products of Eastern Metals, Dickey Tool, Home Safety, or any of the other companies?

A Not that I recall.

Q That's through the whole time you have been a consultant for Traffix Devices?

A That's right.

Q You indicated you have seen an actual product of WindMaster. When was the occasion that you saw that, or first saw it, if there were more than one occasion?

A I'm not sure of the dates. It could have been as long as two years ago.

Q Was it before the lawsuit was started?

A I had no knowledge of any lawsuit until just recently. By "recent," I mean it was within the last month or two.

Q Was your first knowledge of the lawsuit about the time that you were asked questions relative to the functional issue which led to your statement on or about that time that you first learned of the lawsuit?

A I don't really -- I don't really understand that.

Q You said recently, within the last short period of time. I see your statement is dated December 20

1996. Was it on or about that date that you first became aware of the lawsuit?

A I think it was shortly before that. It was indicated to me that they wanted me to be an expert witness in defending their position on this, and it was sometime late last year.

Q Have you seen a Windmaster product since that time to the present time?

A I don't recall having seen one. Possibly driving down the highway, because there are thousands of them around. There are a lot of them.

Q How can you tell they are WindMasters?

A Well, I was acquainted with the WindMaster design for many years. They have two closely spaced vertical springs, is the predominant feature that identifies them.

Q That's when you are driving down the highway, then, and see a sign with two closely spaced coil springs, those are the WindMasters you are referring to?

MS. MARSHALL: I'm going to object, Counsel. That's not what the witness said. I think you're mischaracterizing his testimony.

BY MR. JOHN A. ARTZ:

Q Can you answer the question?

MS. MARSHALL: If you can, go ahead.

THE WITNESS: No, I -- that's -- that's the appearance that -- it's the WindMaster is the only one that I have seen that has the two vertical springs that are closely spaced.

BY MR. JOHN A. ARTZ:

Q So when you see a sign stand on the highway that has that' look, you know it's a WindMaster?

A Not necessarily. I was driving down to my home in Taos and I saw one beside the road that I recognized as a Traffix Devices stand.

Q Which Traffix Devices stand?

A The one that's in question here, the Windbuster.

Q Was that the first one you have seen on the road, the one recently?

A Oh, last fall I saw some of them around the Taos area.

Q The fall of 1996?

A '96, that's correct.

Q Prior to that time, the only ones you saw like that were the WindMaster?

A That's correct.

Q You said you had one in front of your house. What sign stand were you referring to?

A A Windbuster.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN'
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v

TRAFFIX DEVICES, INC.,

Defendant.

Case No: 95-CV-40230
Hon. Paul V. Gadola

The Deposition of WALTER KUCZERA, was taken in the above-entitled cause before me, Deborah LaCroix, a Court Reporter (CSR-1454) and Notary Public for the County of Wayne, State of Michigan, acting in and for the County of Oakland at 201 W. Big Beaver Road, Suite 400, Troy, Michigan, on Friday, August 9, 1996 commencing at or near the hour of 9:00 a.m.

APPEARANCES:

JOHN S. ARTZ
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22nd Floor
Southfield, Michigan 48075
(810) 358-4400
Appearing on behalf of
Plaintiff

WALTER KUCZERA

Called as a witness for examination under the Federal Rules of Civil Procedure after having been first duly sworn, by the Notary Public, was examined and testified as follows:

EXAMINATION BY MR. ARTZ

Q Mr. Kuczera, could you please state your name for the record and spell your last name.

A It's Walter Kuczera. And that's K-u-c-z-e-r-a.

Q Could you please tell us what your home address is?

A 1205 Via Visalia.

Q How do you spell Via?

A V-i-a. The second word is V-i-s-a-l-i-a.

Q What city is that in?

A San Clemente, California.

Q How old are you?

A I'm 57.

Q Are you here today in response to the notice of deposition of 30(b6)?

* * * * *

[Pages 5-6 Omitted]

A No. It was an accident.

Q Negligence?

A I'm not sure what the claim was.

Q You're currently employed at TrafFix Devices and are one of the owners, correct?

A That's correct.

Q What is your current title?

A Vice President of Marketing.

Q Can you go through your, you joined as I understand TrafFix Devices, in October 1986, is that correct?

A February of 1987.

Q February 1987. Okay.

Can you detail for me your prior employment history prior to joining TrafFix Devices?

A Prior to TrafFix Devices I had been national sales manager with a company called Pave Mark.

Q During what years were you employed there?

A That was a short duration. It was three or four months of 1986.

Q What was your title or principle responsibility there?

A National sales manager.

Q For what? What did Pave Mark do? What business were they in?

A They made thermoplastic pavement markings. Pavement

* * * * *

[Pages 8-48 omitted]

bust the force of the wind. And thus Windbuster was created and bantered about and discussed. And other names may have surfaced and this was the one that was retained as what we thought best described the product.

Q Do you know what some of the other names were that were considered by you and Mr. Kulp?

A I can't at this point.

Q Do you know how long this discussion that you just described between you and Mr. Kulp where you ultimately decided on the name Windbuster occurred?

A I would say the discussion process was perhaps 15 minutes.

Q Do you recall when approximately this discussion was?

A I would say approximately in the fall of 1993.

Q In response to one of plaintiff's interrogatories, which I'm not going to mark right now. Specifically in response to interrogatory number three. Take that back. In response to interrogatory number two it's indicated approximately October or November of 1993 the mark was selected. Is that consistent with your understanding?

A I believe that is correct.

Q You indicated previously that prior to joining TrafFix Devices you had at least heard of the mark Windmaster,

correct?

A That is correct.

Q Had you had more exposure to the mark or product Windmaster since you, after you joined TrafFix Devices?

A Yes.

Q And can you describe for me what your exposure to the Windmaster or familiarity of the Windmaster was after joining TrafFix Devices?

A Primarily seeing Marketing Displays at various trade shows we attended.

Q Did you ever see any of their products in the field?

A Yes.

Q Do you know on how many occasions?

A Numerous occasions driving down the highway.

Q How did you know they were a Windmaster sign driving down the highway?

A I would say I became more familiar with the products after seeing it at trade shows.

(Question repeated by court reporter)

Q Can you please answer that question?

MS. MARSHALL: I believe he was Counsel. I believe you cut him off mid stream.

MR. ARTZ: I don't believe he's answering the question but if you are I apologize.

Can you please answer it then?

A As I became familiar with, more familiar with the product after seeing it at trade shows I became more familiar and I believe I can identify it by going down the highway as a result of having seen these at trade shows and become more familiar with it.

Q So as you're driving by the highway and you're looking at it, it seemed to you to look the same as the ones you had seen at trade shows?

A That's correct.

Q So you were able to identify it by its look?

A I believe I would not be able to swear that I could identify a Windmaster sign in the field but I believe those that I saw were going down the highway as a result of trade show exposure.

Q As you were going down the highway in your mind having known what or seen what a Marketing Displays Windmaster sign looked like, as you were driving down the highway you looked at that sign you had no doubt in your mind that that was a Windmaster as you drove by that, correct?

MS. MARSHALL: I object.

You may answer.

You're characterizing the witness's

* * * * *

[Pages 52-56 omitted]

their passing out to their customers. And those would be, that's basically how that would be.

Q You don't do any advertising in papers or journals in California?

A We did no advertising.

(Off the record)

Q You were discussing trade shows, Mr. Kuczera. How many trade shows do you personally attend a year?

A Approximately 10.

Q Are they all across the country?

A Yes.

Q You attend trade shows where Marketing Displays is also present, correct?

A In some cases yes.

Q Not all of them though?

A I'm sorry?

Q Not every trade show that you go to is Marketing Displays always there?

A That's correct.

Q And other competitors are there as well, is that correct at certain trade shows?

A That's correct.

Q Can you identify for me who some other competitors are that you have seen at other trade shows within the last

couple years?

A Competitors?

Q Competitors that sell traffic sign stands.

A Bone Safety. Eastern Metals of Elmira. Bone Safety of Atlanta. Work Area Protection, St. Charles, Illinois. Sign-up Corporation. Pacific Safety. Service and Materials.

Q S & S?

A No.

Services and Materials in Elwood, Indiana.

Q I'm sorry.

A I believe that's it. In terms of people that we see at trade shows.

Q Are you aware of any other competitors who sell sign stands that you've not seen at trade shows?

A Yes. S & S. And there have been some in up state New York.

Q Have you ever heard of a company called Dickey Tool?

A Yes I have.

Q Have you ever seen them at any trade show?

A I've seen them at a trade show but I can't recall if they have any products in the sign stand area. They, I may have seen in the service and materials booth their

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

vs.

TRAFFIX DEVICES, INC.

Defendant.

Case No.: 95 CV 40230
October 22, 1996

DEPOSITON OF CECIL URSPRUNG

ATKINSON-BAKER, INC.
CERTIFIED COURT REPORTERS
330 North Brand Boulevard, Suite 250
Glendale, California 91203
(818) 551-7300

MS. JENITZA A. MOCHULSKY, COURT REPORTER

FILE NO.: 9620554

06119.

Q Can you state your name for the record?

A Cecil Earl Ursprung, Jr.

Q And how old are you, Mr. Ursprung?

A 52.

Q Could you summarize for me your education beyond high school?

A I have a Bachelor's in Business Administration from Baylor University, Waco, Texas. I have a Master's in Business Administration from Washington University in St. Louis, and I have completed some post-graduate work at the University of Michigan.

Q What was your post-graduate work in?

A Business.

Q Could you summarize your employment since the time you got your degree from Baylor?

A Um-um. I worked for a period of time for Anheuser-Busch when I was in St. Louis.

Q Can you tell me when that was, approximately?

A 1967, '68, and after that I worked for a couple of years for Container Corporation of America in Chicago.

Q When was that, approximately, can you tell me when that was?

A From '68 to '70, and then for about three years after that I worked for the Ecology Center in Ann Arbor, Michigan and I worked for CPHA in Ann Arbor, Michigan, in a marketing job.

Following that I worked for three years for Marketing Displays in Farmington Hills, Michigan.

Q Could you tell me about when that was, those three years?

A 1980 to 1983 and then for the last 13 years I have worked for Reflexite Corporation.

Q What was your job position when you worked at Anheuser-Busch?

A I was a market analyst in the Corporate Planning Division.

Q What were your responsibilities as market analyst?

A To analyze competitive data as well as data generated by Anheuser-Busch to help the company on its marketing strategy.

Q What was your position at Container Corporation of America?

* * * * *

[page 9 omitted]

A That is correct.

Q What was your position at MDI?

A Marketing Manager.

Q Was that always your position?

A Um-um.

Q What were your responsibilities as Marketing Manager of MDI?

A To provide the marketing programs for our representative and distributor sales force and to develop new markets for the company.

Q I'm going to come back to that, I'm just going to finish out your work experience. What is your position with Reflexite Corporation?

A President.

Q Has it always been your position?

A Yes.

Q I just want to get on the record, at Reflexite does Reflexite work with both Marketing Displays and Traffix Devices, Inc.?

A Yes, we do.

Q Were you assigned any specific products at MDI over which you had primary marketing responsibility?

A I had responsibility in the marketing

* * * * *

[pages 11-13 omitted]

A Yes.

Q Were those springs relatively closer than in the poster type Windmaster?

A Yes.

MR. ARTZ: Just so the record is clear, I think you said a rectangular sign.

MR. HOFFMANN: Diamond shaped.

MR. ARTZ: Same thing.

Q Was part of your responsibility at MDI to sell--strike that. Did you have primary sales responsibility for the Windmaster type signs?

MR. ARTZ: Object to the term primary sales responsibility unless you understand to what he is referring?

A Yes, maybe you had better ask that in a different way.

Q Did you have sales responsibility for the Windmaster signs?

A Yes.

Q Did you have contact with the end user or purchaser of the sign?

A Yes.

Q Was it your responsibility to sell the sign stand to the purchasers?

* * * * *

[pages 15-45 omitted]

recollection is none of them worked nearly as well as the Windmaster.

Q But as far as you know they worked satisfactorily, maybe just not as well as MDI Windmaster?

A They tried to compete for business.

Q Do you know if any of them were successful in taking any business away from MDI?

A Mr. Artz, I was the marketing manager at MDI. The--

Q I mean--go ahead, I'm sorry.

A The market for these devices is very large, and a number of factors affect the customer's buying decision. Performance was one, price was one, durability was one and relationships I'm sure played a role, and a number of manufacturers shared that market for those stands.

Q Would you say that the design, I'm talking about the physical, or the appearance of the MDI Windmaster is unique in the marketplace?

A Yes.

Q Have you ever seen any other design like it?

A During the period that I worked at MDI

the only other one that I was aware of was the device manufactured by Sign-Up. Since I have left MDI, there have been a number of similar devices in the marketplace.

Q Do you know if Traffix is one of those that you would characterize as similar?

A Yes, it is.

Q Similar in the way it looks?

A Correct.

Q I'm just trying to understand what you are saying.

MR. HOFFMANN: I'm going to object.

Q I'm trying to understand your testimony. When you say "similar," are you referring to its appearance?

A I think part of it is appearance and part of it is the performance that various manufacturers promote for their devices.

Q Did you ever promote the appearance of MDI's Windmaster?

A Yes, I did.

Q Do you recall what about it you would have or what in general you would have said to promote the appearance of it?

* * * * *

[page 48 omitted]

Q Where was that?

A Learsiegler Corporation.

Q Did Learsiegler happen to become a distributor for MDI for its Windmaster products?

A Yes.

Q Do you recall if you were involved in negotiating that distributorship agreement?

A Yes.

Q Do you know if Mr. Kulp was involved in negotiating the distributorship agreement on behalf of Learsiegler?

A Yes, he did.

Q Do you recall how big of a distributor Learsiegler was of Windmaster products?

MR. HOFFMANN: I object as vague.

A How big in what respect?

Q Do you recall if Learsiegler was one of the largest sellers of the Windmaster products of MDI's distributors?

A Yes, I do, and these--yes, they were.

Q Did you ever receive feedback from Mr. Kulp about the Windmaster product?

A Yes, I did.

Q Do you recall what Mr. Kulp would tell

you about the Windmaster product as to how they were received in the marketplace?

MR. HOFFMANN: I object as calling for hearsay.

MR. KERRIGAN: You can answer.

A Yes, I do.

Q What did Mr. Kulp tell you about how the products were received in the marketplace?

MR. HOFFMANN: I object as hearsay.

MR. KERRIGAN: You can answer if you recall.

A The performance was extraordinary and so was the price.

Q Do you recall Mr. Kulp ever saying anything about the appearance of the Windmaster product?

A I don't recall.

Q Now, when you were saying that before--I'm sorry, when I had asked you, were those comments that Mr. Kulp had heard from customers or were those comments that Mr. Kulp made to you from his own personal knowledge, if you recall?

MR. HOFFMANN: Object, calling for

* * * * *

[page 51 omitted]

each other at trade shows, conferences, there would usually be conversations and often part of those conversations would relate to sign stands.

Q Was this during his tenure at Learsiegler or was this after he had left and formed Traffix Devices?

A Both.

Q So you had conversations with Mr. Kulp about the Windmaster sign stand after he had left Learsiegler and was at Traffix Devices?

A Yes.

Q Do you recall the substance of any of those conversations?

A No, just "How is business," "What is new with your company," what is new with our company, "What is new in the marketplace," but I don't recall specific conversations.

Q Did you ever go on any sales calls with Mr. Kulp?

A Yes.

Q Do you know how many?

A Numerous.

Q So Mr. Kulp was frequently--strike that. You and Mr. Kulp were--strike that

again.

Mr. Kulp would have been present when you would have promoted the Windmaster product to customers and he would have been there when, to receive any feedback that customers might have had?

A Yes.

MR. HOFFMANN: I'll object. I didn't get a chance to interpose my last objection, but I'll object as compound.

MR. KERRIGAN: Can you repeat back the question?

(Requested portion was read by the Reporter.)

MR. ARTZ: I think that's a valid objection. I think maybe I should break that up.

Q Mr. Ursprung, is it true that Mr. Kulp would have been present with you on customer visits where you would have promoted the advantages of the Windmaster product?

A Yes.

Q Is it also true that Mr. Kulp would have been present with you to receive any feedback that customers may have had regarding

the Windmaster product?

A Yes.

Q So it's also true that Mr. Kulp would have been present to receive any feedback that, positive feedback that customers may have had regarding the performance and/or appearance of the Windmaster product?

A Yes.

MR. ARTZ: I don't have any more questions.

MR. HOFFMANN: I have a few follow up questions.

REDIRECT EXAMINATION

BY MR. HOFFMANN:

Q I would like to go back, I think early on Mr. Artz asked you about, or if you have knowledge about competitive wind resistant sign stands and I believe you mentioned Eastern Metals, Dickie Tool, Traffix Devices and Sign-Up Corporation, is that correct?

A Yes.

Q Do you know of any other competitive wind resistant sign stands?

* * * * *

[pages 55-61 omitted]

for speculation.

A He was introducing a design that he thought was an improvement and a better value than Windmaster, and I think maybe that model used springs, but in those days the Windmaster was achieving quite a success in the market and people were trying things other than a steel coil spring to make a sign wind resistant, and I just can't recall what it was he was doing, and my recollection is more of our conversation than it was on his device.

Q Last question. If you were to be driving down a freeway, would you be able to, and you saw, drove by a construction zone, would you be able to spot a Market Displays sign immediately?

MR. KERRIGAN: Object to that.

MR. HOFFMANN: Objection.

MR. KERRIGAN: To the extent it calls for speculation.

A The answer is yes.

MR. ARTZ: I don't have any further questions.

MR. HOFFMANN: I don't either. I want to thank you for your time.

[62]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v

TRAFFIX DEVICES, INC.,

Defendant.

Civil Action No. 95- CV- 40230
Hon. Paul V. Gadola

DECLARATION OF RONALD LUNT

I, Ronald Lunt, hereby declare and state as follows:

1. I am submitting this Declaration in support of Marketing Displays, Inc.'s ("MDI") Motion relative to the design of the WINDMASTER sign stand and I am incorporating by reference, all statements made in my prior Declaration dated December 3, 1996.

2. As stated in my previous Declaration, I work for the City of Dover, Delaware as the Transmission and Distribution Manager, and have been employed there since 1988.

3 As the Transmission and Distribution Manager, I am responsible for preparing and do prepare the majority of all specifications for products that my department (the electrical department) needs to purchase.

4. I often prepare a specification, by copying the specifications from literature for a product that we currently buy, because I know that it will meet our desired criteria.

5. Once I prepare the specification, the specification then goes to the City's Purchasing Department whose job responsibilities include filling out the formal paperwork and sending it out in order to secure the appropriate product.

6. In mid-1995, I prepared a specification to obtain a quote for sign stands and some roll-up signs. I based my specification for the sign stands on two brochures that I picked up somewhere (I just recently came across the brochures again). One brochure was for the WINDMASTER product and one was for the WINDBUSTER product. My best recollection is that I picked up both brochures at a tradeshow.

6. While preparing the specification to purchase the sign stands, I had the two brochures in front of me. The products displayed in the brochures looked alike and had similar names. I thus believed they were in some way related.

7. Moreover, based upon my experience in preparing product specifications, sign stands are such a small portion of what the City of Dover, Delaware purchases, that very little care is taken with regard to purchasing sign stands other than to insure that what is purchased meets the specifications.

8. After I prepared the specification for the sign stand, I gave it to the Purchasing Department to fill out the final paper work and send out.

9. Based on my experience and in my dealings with other purchasers at City levels, it is my opinion that sign stands similarly constitute a small portion of what the majority of these purchasers buy. Moreover, based on my experience and dealings with various City purchasers, because they purchase such a small amount of sign stands, they also take very little time in making purchasing decisions for sign stands, other than to check that they meet specification and are in inexpensive.

10. When I began my employment with the City of Dover, Delaware, we had WINDMASTER sign stands on hand and they were being used in the field by our crews. I was thus familiar with their look and operation. Accordingly, when this issue was first brought to my attention, after the bid had been sent out, I assumed that the WINDBUSTER, by its looks, was just another product offered by MDI and was related to its prior sign stands.

11. I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

Dated: 2/18/97

/s/ Ronald Lunt
Ronald Lunt
Transmission &
Distribution Manager,
City of Dover, Delaware

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v

TRAFFIX DEVICES, INC.,

Defendant.

Civil Action No.95-CV-40230
Hon. Paul V. Gadola

DECLARATION OF KENNETH L. HYDE

I, Kenneth L. Hyde, hereby declare and state as follows:

1. I am submitting this Declaration in support of MDI's Motion For Summary Judgment relative to the trade dress issue and was recently deposed on February 14, 1997.

2. I am currently employed by MDI as a Regional Sales Manager. My sales territory includes the Western United States and two Provinces in Canada.

3. As part of my duties and responsibilities as Regional Sales Manager, I make sales calls on various distributors and purchasers of MDI's products, including distributors and end users of the WINDMASTER and STEELMASTER products. I have also become familiar with the sign stands of various third parties that compete with the WINDMASTER and STEELMASTER products.

4. One of these competitors is TrafFix Devices and its competing products include its WINDBUSTER dual spring-mounted sign stand, and its springless wind-resistant "Traffix sign stand" (with a flexible sign panel).

5. Other competitors' products with which I am familiar include: (1) Sign-up Corp.'s "Power Cell" sign stand; (2) Eastern Metals flat-spring sign stand; (3) Dicke Tool's horizontal spring sign stand; (4) Services and Materials' "Quadra Flex" sign stand; and (5) Work Area Protection's 45 degree spring sign stand.

6. In my opinion, each of the competitive products listed in paragraph 5 above is equivalent in performance to MDI's WINDMASTER and STEELMASTER products and TrafFix's WINDBUSTER sign stand.

7. I base my opinion on the fact the many purchasers in my territory purchase and use these competitive products. I further base my opinion on the fact that I have lost sales of MDI's WINDMASTER and STEELMASTER product to most, if not all of these purchasers. The companies to whom I lose the most sales are Sign-up, Dicke, Eastern Metals, and TrafFix. Additionally, I find further support for my opinion that if these other products were not competitive with the WINDMASTER and STEELMASTER, then MDI would have all the sales of wind-resistant sign stands. However, this is not the case.

8. Moreover, each of the products listed in paragraph 5 is generally equivalent to MDI' s WINDMASTER and STEELMASTER products in cost. On many sales, MDI has been the high bidder and lost the sale to a lower bidder. Obviously, other factors also are important to some customers since in some cases, MDI has been the low bidder and still lost the sale to one of these competitors who had a higher bid.

9. While in the field selling MDI's products and at trade shows, I have spoken with and met various customers and distributors who have been confused by the appearance between MDI's WINDMASTER and STEELMASTER sign

stands on one hand, and TrafFix's dual spring-mounted sign stands on the other hand. The customers and distributors have exhibited confusion by, for example, seeing a TrafFix dual spring sign stand product and mistakenly assuming it is a WINDMASTER product or mistakenly assuming that it was made or sold by MDI.

10. These instances of confusion are numerous and happen frequently. It is hard to put an exact number on the amount, but I am certain that I am aware of at least twenty (20) instances of confusion between the parties' products. It is difficult for me to specifically identify each of the individuals by name who exhibited the confusion since the acts of confusion usually occurred as the persons walked by our booth at a trade show or as an engineer or contractor at a DOT made a passing comment. I am certain, however, that these acts did occur and that the comments reflected their state of mind.

11. Also, based on my experience dealing with customers and prospective customers, I have observed the level of care exercised by these purchasers in making purchasing decisions. The level of care varies from professional purchasers, who exercise a higher degree of care to very unsophisticated purchasers who exercise minimal care.

12. I declare that all statements made its this declaration are true, and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

Dated: February 27 1997

/s/ Kenneth L. Hyde
Kenneth L. Hyde

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v

TRAFFIX DEVICES, INC.,

Defendant.

Civil Action No.95-CV-40230
Hon. Paul V. Gadola

DECLARATION OF SEAN P. NOONE

I, Sean P. Noone, hereby declare and state as follows:

1. I am submitting this Declaration in support of MDI's Motion For Summary Judgment relative to the trade dress issue and was recently deposed on February 12, 1997.

2. I am currently employed by MDI as a Regional Sales Manager. My sales territory generally includes the Midwestern United States.

3. As part of my duties and responsibilities as Regional Sales Manager I make sales calls on various distributors and purchasers of MDI's products, including distributors, Departments of Transportation (DOT) and end users of the WINDMASTER and STEELMASTER products. I have also become familiar with the sign stands of various

third parties that compete with the WINDMASTER and STEELMASTER products.

4. One of these competitors is TrafFix Devices and its competing products include its WINDBUSTER dual spring-mounted sign stand, and its wind-resistant "TrafFix sign stand" that does not have any springs.

5. Other competitors' products with which I am familiar include: (1) Sign-up Corp.'s "Power Cell" sign stand; (2) Eastern Metals' flat-spring sign stand; (3) Dicke Tool's horizontal spring sign stand; (4) Services and Materials' "Quadra Flex" sign stand; (5) Work Area Protection's 45 degree spring sign stand.

6. In my opinion, each of the competitive products listed in paragraph 5 above is equivalent in performance and cost to MDI's WINDMASTER and STEELMASTER products and TrafFix's dual spring-mounted sign stand. It is also my opinion that these products are equivalent in performance and cost to wind-resistant sign stands with the fiberglass cross-braces, such as the TrafFix sign stand".

7. I base my opinion on the fact the many purchasers in my territory purchase and use these competitive products. I further base my opinion on the fact that I have lost sales of MDI's WINDMASTER and STEELMASTER to most, if not all ,of these purchasers. The companies to whom I lose the most sales are Dicke, Eastern Metals, Work Area Protection, and TrafFix.

8. Since TrafFix's dual spring-mounted sign stand was introduced, I have encountered large numbers of instances of actual confusion by prospective purchasers and end users of the parties' products. These instances of confusion include the following:

a. Approximately five (5) instances of confusion in both 1995 and 1996 at the Fargo ATSSA "How-To" trade show, wherein prospective purchasers walked by MDI's booth and after seeing the WINDMASTER and/or

STEELMASTER sign stands, stated that they were already purchasing MDI's sign stands, or asked if we were associated with TrafFix.

b. Approximately six (6) instances of confusion at a North Dakota trade show in both 1995 and 1996. At this trade show, various representatives from the North Dakota Department of Transportation exhibited confusion between the look of the WINDMASTER and/or STEELMASTER sign stands and TrafFix's dual spring-mounted sign stands. They exhibited confusion in a similar fashion as indicated above, namely, by walking by MDI's booth, and after seeing our display, stating that they were already purchasing MDI's sign stands or asking if we were associated with TrafFix.

c. At least one instance at the Missouri "How-To" trade show in Kansas City which was held in either 1995 or 1996.

d. An instance of confusion at the South Dakota Department of Transportation in Rapid City, where I went out to check on a product because the customer (South Dakota DOT) told me that it was a MDI product. However, when I checked out the product, it was TrafFix's dual spring-mounted sign stand and not MDI's sign stand.

e. One instance of confusion at Northern States Power Utilities in Minnesota in January 1997, where I went into its garage location and after showing this customer one of MDI's products, I was told that they already purchased MDI's products. When they showed the products to me, however, it was not a MDI product, but instead a TrafFix sign stand.

f. One instance of confusion at Manitoba Hydro where I went to talk to their purchasing people, and they said that they were already purchasing MDI's products. They sent me to another garage location to look at the products and they were TrafFix's sign stands.

g. Another instance of confusion at the Kansas Department of Transportation where I set up a sample or

displayed a brochure to someone in their vehicle garage and was told that they were already purchasing our products. When I asked to see them, however, I was shown TafFix's sign stands.

h. There also have been numerous other instances of confusion, but I cannot recall where they occurred or who was the customer that exhibited the confusion.

i. In any event, it was clear to me by the comments and acts of these end users, that they had confused states of mind between the MDI and TrafFix products due to their identical product configurations.

9. Additionally, I am aware of another competitive wind-resistant sign stand. This sign stand is manufactured by Lang Products International, Inc. which is located in Cottage Grove, Minnesota. The Lang product has a springless sign stand, but has a wind-resistant sign with bendable fiberglass cross braces that allow the sign face to flex. The Lang advertising literature indicates that their sign stand can withstand winds up to sixty miles an hour. This sign stand is competitive with MDI's WINDMASTER and STEELMASTER products because the Minnesota Department of Transportation purchased a significant number of these sign stands in a competitive bid situation with MDI's sign stands.

10. I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements, and the like are punishable by fine and imprisonment or both, under 28 U.S.C . § 1746

Dated: February 27, 1997 /s/ Sean P. Noone
Sean P. Noone

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,
Plaintiff,

v

TRAFFIX DEVICES, INC.,
Defendant.

Civil Action No.95-CV-40230
Hon. Paul V. Gadola

DECLARATION OF PETER J. SCULLEY

I, Peter J. Sculley, hereby declare and state as follows:

1. I am submitting this Declaration in support of MDI's Motion For Summary Judgment relative to the trade dress issue and was recently deposed on February 12, 1997.

2. I am currently employed by MDI as a Regional Sales Manager. My sales territory includes the Eastern United States.

3. As part of my duties and responsibilities as Regional Sales Manager I make sales calls on various distributors and end users of MDI's products, including distributors, Departments of Transportation (DOT) and end users of the WINDMASTER and STEELMASTER products. I have also become familiar with the sign stands of various

third parties that compete with the WINDMASTER and STEELMASTER products.

4. Competitors' products with which I am familiar include: (1) Sign-up "Power Cell" sign stand; (2) Eastern Metals flat-spring sign stand; (3) Dicke Tool's horizontal spring sign stand; (4) Services and Materials' "Quadra Flex" sign stand; (5) Korman's compression/tension "teeter-totter" spring sign stand; and (6) Work Area Protection's 45 degree spring sign stand.

5. In my opinion, each of the competitive products listed in paragraph 4 above is equivalent in performance to MDI's WINDMASTER and STEELMASTER products and TrafFix's dual spring- mounted WINDBUSTER sign stand.

6. I base my opinion on the fact the many purchasers in my territory purchase and use these competitive products. I further base my opinion on the fact that I have lost sales of MDI's WINDMASTER and STEELMASTER to most, if not all, of these competitors. The companies to whom I lose the most sales are Dicke, Eastern Metals, and Korman. Additionally, I find further support for my opinion that if these other products were not competitive with the WINDMASTER and STEELMASTER, then MDI would have all the sales of wind-resistant sign stands. However, this is not the case.

7. Moreover, each of the products listed in paragraph 4 is generally equivalent to MDI's WINDMASTER and STEELMASTER products in cost. In fact, in some of the sales referred to above, MDI has been the low bidder and lost the sale to a higher bidder. On other sales, MDI has been the high bidder and lost the sale to a lower bidder.

8. Attachment 1 hereto is a list of competitive wind-resistant sign stands that have been approved by the Maryland DOT and their respective manufacturers. The manufacturers of these competitive sign stands include Bone Safety, Dicke Tool Co., Eastern Metals, Flasher Handling, Lang Products, Korman Signs, Services & materials, MDI and TrafFix. This

list shows that there are a large number of competitors that sell comparable wind-resistance sign stands that appeal to and are purchased by customers.

9. Based on my experience with the various purchasers and prospective purchasers in the traffic control industry, the level of purchasing care varies from purchaser to purchaser. On the one end, some purchasers are professional purchasers and fairly sophisticated. However, even more purchasers are extremely unsophisticated in that they exercise minimal care when making a purchasing decision.

10. I declare that all statements made in this declaration are true and correct and are made with the knowledge that willful, false statements and the like are punishable by fine and imprisonment or both, under 28 U.S.C. § 1746.

Dated: February 27, 1997

/s/ Peter J. Sculley
Peter J. Sculley

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.

Plaintiff,

v

TRAFFIX DEVICES, INC.,

Defendant.

CIVIL NO. 95-CV-40230

HONORABLE PAUL V. GADOLA

MARKETING DISPLAY'S RESPONSES TO DEFENDANTS FIRST SET OF INTERROGATORIES TO PLAINTIFF NOS. 1-25)

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff, Marketing Displays, Inc. ("MDI") responds to Defendant's, Traffix Devices, Inc. ("Traffix"), First Set Of Interrogatories To Plaintiff (Nos. 1-25).

GENERAL OBJECTIONS

1. Plaintiff objects to Defendant's definition of the term "MDI" or "Plaintiff" as encompassing individuals and/or entities over which MDI has no control.

2. Plaintiff objects to Defendant's definition of the term "sign stands" and "wind resistant sign stands" as vague, indefinite and, as understood, unnecessarily limiting.

3. Plaintiff objects to Defendant's definitions to the extent they seek to place a burden on Plaintiff that is greater than that imposed by the Federal Rules of Civil Procedure.

4. Plaintiff objects to this set of interrogatories to the extent it exceeds more than interrogatories totaling "25 in number including all discrete subparts" as limited by Fed. R. Civ. P. 33 (a).

5. Plaintiff objects to Defendant's Definitions and Instructions to the extent they are inconsistent with or seek information not covered by the Federal Rules of Civil Procedure.

6. Plaintiff objects to these requests to the extent they seek information and/or documents protected by the attorney client privilege and/or work product immunity. Such information and for documents will not be produced.

RESPONSES

INTERROGATORY NO. 1

Identify and describe each element or feature of MDI's traffic warning sign stands that MDI contends is proprietary trade dress of MDI.

Answer To Interrogatory No. 1:

Plaintiff objects to this interrogatory as overly broad, unduly burdensome, vague, and not likely to lead to the discovery of admissible evidence. Subject to these further objections and the General Objections, Plaintiff answers as follows:

Plaintiff's proprietary trade dress is comprised of (a) a relatively narrow base member; (b) a pair of vertically arranged closely spaced coil springs attached to the base

member; (c) a plurality of leg members attached to the base member and extending therefrom at angles thereof; (d) an upright member attached to the coil springs; and (e) a sign attached to the upright member.

INTERROGATORY NO. 2

Identify all patents and patent applications, domestic and foreign, of MDI which disclose or describe sign stands.

Answer To Interrogatory No. 2:

Plaintiff objects to this interrogatory as overly broad, unduly burdensome, vague, and not likely to lead to the discovery of admissible evidence as any of MDI's patents are not relevant to any issue in this proceeding. Subject to these further objections and the General Objections, Plaintiff answers as follows:

The identity of any of Plaintiff's patent applications is confidential pursuant to 35 U.S.C. § 122 and therefore need

Answer To Interrogatory No. 25:

Plaintiff objects to this interrogatory as overly broad, unduly burdensome, vague, and not likely to lead to the discovery of admissible evidence. Plaintiff further objects to this request as it exceed the 25 interrogatory limit prescribed by Rule 33 of the Federal Rules of Civil Procedure. Subject to these further objections and the General Objections, Plaintiff answers as follows:

The third party sign stands of which MDI is aware that have any of the features listed in this interrogatory are Bone Safety, Dickey Tool, Eastern Metal, and Sign-Up.

As to Objections,

BROOKS & RUSHMAN P.C.

/s/ John S. Artz
JOHN A. ARTZ (P 24679)
FRANK A. ANGILERI (P 45611)
JOHN S. ARTZ (P 48578)
1000 Town Center
Twenty-Second Floor
Southfield, Michigan 48075
(810) 358-4400

Dated: July 29, 1996

VERIFICATION

Under penalty of perjury, Lisa Sarkisian declares as follows

I am an officer of Marketing Displays, Inc., and a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing Responses to Defendant's First Set of interrogatories to Plaintiff (Nos. 1-25) and know its contents. The matters stated in it are true to the best of my knowledge and belief.

/s/ Lisa A. Sarkisian
Lisa A. Sarkisian,
Assistant Secretary,
MARKETING DISPLAYS,
INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT SARKISIAN,

Plaintiff,

v.

WINN-PROOF CORPORATION,
et al.,

Defendants.

Civil No. 75-1131

JUDGMENT

Pursuant to the Opinion of this court dated June 15, 1978, as modified by the Order dated July 21, 1978,

It is ORDERED and ADJUDGED that:

1. United States Letters Patent No. 3,646,696 is valid.

2. Defendants' sale of sign stands which were put in evidence at trial infringe the claims of patent 3,646,696.

3. United States Letters Patent No. 3,662,482 is invalid to the extent that it claims a sign stand using preloaded coil springs already covered by patent 3,646,696, but is otherwise valid.

4. Defendants, their agents, servants, employees, attorneys, and those persons in active concert or participation with them, are hereby permanently enjoined and restrained from making, selling, soliciting, or filling orders in any

manner or using, either alone or in direct or indirect concert with others, prior to March 7, 1989, without the consent of plaintiff, any unanchored spring mounted sign stands, with a pair of spaced-apart springs extending upwardly from the base, including but not limited to the spring mounted sign stands identified by defendants by the names and models "Winn-Safe", "Winn-Proof", "WP-30", WP-32", "WP-48", "No-Tip", "NT-36", and "NT-48", and all other spring mounted sign stands which are the equivalent of any of the foregoing or a colorable imitation thereof.

5. This injunction and an accounting for damages are stayed pending the outcome of an appeal, provided that defendants file a timely notice of appeal and a supersedeas bond on appeal in the amount of $15,000.

6. Defendants' counterclaims are dismissed.

7. Plaintiff's claims for treble damages and attorney fees are denied.

8. Plaintiff is entitled to court costs to be assessed by the clerk.

Dated this 9th day of August. 1978.

/s/ Otto R. Stopil, Jr.
United States District Judge

[COUNSEL] [FILED]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT SARKISIAN

Plaintiff,

v.

WINN-PROOF CORPORATION
WILLIAM A. WERNER, AND
WER-NEL ENTERPRISES, INC.

Defendants.

Civil Action No. 75-1131

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. This is an action for patent infringement arising under the Patent Laws of the United States, Title 35, United States Code, and includes claims for wilful and wanton infringement, false patent marking, unfair competition, fraud on the Patent Office and patent misuse. Jurisdiction and venue are proper, 28 U.S.C. §§1338 (a), (b), 1400 (b). (PTO I)

2. Plaintiff Robert Sarkisian is an individual residing in Bloomfield Hills, Michigan and is the founder, President and owner of Marketing Displays, Inc., a Michigan Corporation having its principal place of business in Farmington Hills, Michgian. (PTO II, 1; Sarkisian St. 1)

3. Defendant William Werner is an individual residing in Salem, Oregon. (PTO II, 2)

4. Defendant Winn-Proof Corporation (and its successor Winn-Safe Corporation) is an Oregon Corporation having its principal place of business in Salem, Oregon. Winn-Proof was founded by Werner in June, 1975 and Werner was President thereof for most of its existence. All of the officers and directors of Winn-Proof resigned in early 1976 and that company is no longer active. (PTO II, 3)

5. Defendant Wer-Nel Enterprises, Inc. is an Oregon Corporation having its principal place of business in Salem, Oregon. Wer-Nel was founded by Werner in June, 1976 and he has been the President since its inception. (PTO II, 4)

6. Plaintiff has charged defendants with wilful and deliberate infringement of United States Patent Nos. 3,646,696 and 3,662,482 which issued to and are owned by Sarkisian. (For convenience, these patents will be referred to hereafter as the '696 and '482 patents.) Plaintiff has also charged the defendants with false patent marking in violation of 35 U.S.C. §292. The defendants have counterclaimed for declatory judgments pursuant to 28 U.S.C. §§2201, 2202 that the two patents in suit are invalid and not infringed, that

plaintiff obtained the '482 patent by fraud on the Patent Office, and that plaintiff is guilty of patent misuse. (PTO I; PX 1, 2; Amended Complaint, Answer and Counterclaim)

7. The '696 and '482 patents in suit relate to unanchored, readily portable spring-mounted sign stands which are stable and untippable regardless of the wind conditions. These sign stands are often called curb stands and are positioned outdoors typically adjacent a roadway or a place of business to present safety warnings or advertisements to persons and vehicles passing by. (PX 1, 2; Beaman St. 1-2; Sarkisian St. 2, 5-6)

8. The patented sign stands have an upstanding sign display which exposes a relatively large surface area to wind forces, an unanchored base portion with a pair of spaced-apart elongated leg members, and a pair of springs connecting the sign display and base and having certain characteristics in relation to the sign and weights of the other sign stand components. The pair of springs are arranged in a spaced-apart non-concentric relationship to prevent canting or twisting of the sign display about its vertical axis. (PX 1, 2; Sarkisian St. 5-6; Beaman St. 1-2)

9. The relationship between the surface area of the sign display, the weights of the various components, the distance of the components from one another, the characteristics of the springs, and the length of the base, are such that the sign display remains vertically upright in little or no wind, does not osciallate back and forth, does not yield until slightly before the sign stand would otherwise be blown over, and deflects, without tipping over the entire sign stand. The proportioning and interrelationship of the components is such that in effect the sum of the moments tending to tip the sign over resulting from the weight of the frame, springs and wind force is less than the sum of the moments of the display sign stand resisting such tipping. (PX 1, 2; Sarkisian St. 5-6; Beaman St. 1-2)

10. Uncontradicted evidence at the trial shows that the patented sign stands as disclosed and covered by the claims in issue possess the following characteristics, elements and features which coact to produce, novel and highly advantageous results (Chart PX 77; Beaman Tr. 219-226):

(i) An unanchored sign stand which resists displacement by the wind (sliding or tipping over) through locating the center of gravity of the vertical sign structure so that at all times it remains within the outside perimeter of the sign stand base.

(ii) A readily-portable wind-stable sign stand having an elongated, unanchored and lightweight base supporting a vertical sign structure.

(iii) A stand carrying a sign of sufficient area such that it would be tipped over by wind forces in the absence of means for providing downward deflection of the sign structure relative to the base.

(iv) a sign stand provided with spaced non-concentric springs supporting the vertical sign structure in order to resist twisting and to define a pre-determined direction for sign deflection.

(v) A sign stand with coil springs, the preload (or initial tension) of the springs being adjusted to correlate the initial deflection of the spring supported sign with the force of the wind.

11. Marketing Displays, under license from Sarkisian, manufactures and markets several models of sign stands called "WindMaster" which are of the types disclosed and claimed in the patents in suit. (PTO II, 9; Beaman St. 1-3; Sarkisian St. 1-2; Tr. 117-118; PX 63-65)

12. The "WindMaster" sign stands are very versatile, being capable of use in a wide variety of situations. Marketing Displays predominantly markets the "WindMaster" sign stands for the construction industry and for general advertising and display purposes. The construction-type sign

stands have foldable legs and removable signs so that the units can be easily stored and adapted to display various highway warning messages. The general purpose-type sign stands have rigid (unfoldable) legs and a permanently affixed display sign. Marketing Displays first sold a general-purpose type sign stand in late 1967 and designed its first construction-type sign stand in 1968. (Sarkisian St. 5-6, 8, 12; PX 16-22, 56; PX 63-65)

13. As shown at trial, all of the various "WindMaster" sign stands incorporate all of the features, perform in the same manner, and achieve the same results as the sign stands disclosed and claimed in the '696 and '482 patents. The operational performance of the "WindMaster" sign stand was dramatically demonstrated in high winds which was filmed by the plaintiff and shown at the trial. The "WindMaster" sign stands, both the construction-type and general purpose-type, were placed directly behind an airplane in its propeller wash. Even with the engines at full throttle, which created wind forces as high as 80 miles per hour, all of the "WindMaster" sign stands remained stable. The wind forces merely bent the display sign over relative to the unanchored base and the sign stands did not turn sideways, "walk", or tip over. (Tr. 117-118; PX 63-65; Beaman St. 3-4; PX 72, 72A; Broff St. 5-7; Sarkisian St. 7-8).

14. The evidence shows that the sales of the "WindMaster sign stands from 1967 to date totaled over $2,200,000. (Sarkisian St. 8)

15. Claims 3-5 of the '696 patent and claims 1 and 2 of the '482 patent are the only claims asserted by plaintiff to be infringed by defendants and thus are the only patent claims in issue. (PTO II, 10-11; Beaman St. 1-2, 4)

16. In the embodiment of the invention defined by claims 3-5 of the '696 patent, the spring structure for vertically supporting the sign display comprises a pair of coil springs and utilizes residual stress, or compressive pre-loading, of a predetermined amount between the coils for

maintaining the sign display upright while resisting wind forces less than those which would result in tipping over of the sign stand. At trial, plaintiff's patent and technical expert, Townsend F. Beaman, performed a demonstration of the pre-loading characteristics of the coil springs on a test apparatus that he had devised and constructed (PX 71; Tr. 119-124). For different size signs, adjustments in this residual stress or pre-loading are made in the manufacture of the spring. In the absence of such structure, which enables the normally vertical sign frame to bend over under the influence of a wind force of a predetermined amount, the sign stand would otherwise tip over in such wind force. Further, when the sign display does deflect under high wind forces, because of the geometrical relationship stated to exist among the sign stand components, the unit remains stable in the bent over position even though it is unanchored and can have a virtually weightless base. (Beam St. 1-4; PX 1, 71, Tr. 115-124; Sarkisian St. 5-6)

17. In the embodiment of the invention defined in claims 1 and 2 of the '482 patent, the specific type of springs utilized is not expressed, but the combination and correlation of elements forming the sign stand is defined by a specific formula. That formula allows the sign stand to have an unanchored, virtually weightless base and yet, due to the combination and correlation of sizes, weights and leverage of the components, allows it to remain stable under wind forces with out turning, sliding or tipping over. (Beaman St. 1-4; PX 2; Tr. 116-117).

18. The '696 patent issued on March 7, 1972 to Sarkisian as the inventor on an application filed on September 11, 1967. (PTO II, 5 ; PX 1, 49)

19. The '482 patent issued on May 16, 1972 to Sarkisian as the inventor on an application filed on July 30, 1970. The application which eventually issued as the '482 patent was a properly designated and timely filed "continuation-in-part" (CIP) application related to the then copending application which later issued as the '696 patent. (PTO II, 6; PX 2, 51; Beaman St. 1)

20. The end two-month portion of the '482 patent was dedicated to the public when Sarkisian filed a terminal disclaimer. This shortened the term of the '482 CIP patent and it expires on the same date as the parent '696 patent. (PTO II, 7; PX 51, pg. 41-43) .

21. The respective disclosures of the '482 and '696 patents are substantially the same, except for the addition of Figures 7, 8 and 9 in the '482 patent. Figures 8 and 9, however, are identical to original Figures 1 and 2 of the '696 patent with the sign stands being viewed from the side rather than in perspective. All of the basis for the '482 patent, with the to exception of that pertaining to Figure 7, is contained in the application for the '696 patent as originally filed in 1967. Figure 7 was newly added to the '482 application and depicts an alternate embodiment of the Sarkisian invention (a sign stand construction using flat springs) not involved in this action. (Beaman St. 1; PX 1, 2; Tr. 125-128, 200-202)

22. All of the subject matter of the '482 CIP patent, with the exception of that pertaining to Figure 7, is entitled to the benefit of the September 11, 1967 filing date of the parent '696 application. Although the '482 application is described as a "continuation-in-part" of the '696 application, the only added "new matter" to warrant such designation was the disclosure relating to the flat spring embodiment shown in Figure 7. The entire essence of the '696 patent application is that due to the relationship or the sizes, weights, characteristics and correlation of the various sign stand components, as well as the characteristics of the spring assembly, the sign display will deflect, and the unanchored, readily portable sign stand will not slide or blow away when exposed to a wind force of high magnitude. The '482 application merely states in mathematical terms the correlation and interrelationship between the various sign stand components and conditions which must exist in order for the sign stand not to tip over when deflected in the manner shown in original Figure 2 of the '696 application. The mathematical notations and formula in the '482 patent which

form part of claims 1 and 2 thereof in issue, are inherent from the specification, drawings and claims of the '696 application as filed. (Beaman St. 1; Tr. 125-128, 200-202; PX 1, 2) The defendants' technical expert, William P. Allen, did not dispute the inherency of the formula in the '696 disclosure, but essentially adopted it. (Allen St. 14, 20)

23. Since both patents in suit expire on the same day and have the same effective filing date, they can, for purposes of this suit be viewed as the equivalent of a single, patent having five claims of various scope which are asserted against the accused products of defendants. (Tr. 126)

24. The patented sign stands were designed and developed by Sarkisian in 1967. They were developed to overcome the longstanding problems and safety hazards then present in the outdoor retail and construction sign fields relative to tipping and "walking" of unanchored sign stands. Prior unanchored sign stands were generally of the "A-frame"-type or the "I-frame"- type. The "A-frame"-type sign stands look like a capital "A" from the side with two sign display panels connected at the top and spaced apart at the bottom. These sign stands either rest on the bottoms of the two panels or on legs which project from or are attached to the bottoms of the panels. The "I -frame" -type sign stands have a vertical sign support attached to the middle of an elongated base, such as a pair of legs. The vertical sign support is typically a frame with a sign mounted in it. Some signs are mounted rigidly in the frame, while others are hung by a pair of hooks from the tops of the frames like pendulums, or divided into a plurality of sections like louvers, each louvered section pivoted on a horizontal rod. The frames for the "A"-type and "I"-type sign stands are typically made of angle irons, tubular metal, or wood. (Sarkisian St. 2-6; PX 34; Reams St. 2-5).

25. All of these prior art unanchored sign stands are subject to being moved to unwanted positions and tipped over by wind forces caused either naturally or by gusts created from passing vehicles. The sign stands with pivoted or freely

hanging signs sometimes work slightly better in the wind than the sign stands with the fixed or rigid signs, and were designed for this reason, but still turn over easily when the winds are strong. With the latter sign stands the swinging signs and panels often act as sails or airfoils which assist in raising the stand from the ground, sliding it along the surface, and tipping it over. Also, the constant swinging and pivoting of the signs in these prior stands, when combined with the environmental conditions, results in premature failure, particularly at the sign stand pivot points. (Sarkisian St. 2-6; Reams St. 2-5)

26. In order that these conventional-type sign stands not be mispositioned or blown over by the wind, various types of weighted objects, such as old tires, bricks, cinder blocks, sand bags, etc. are put on them to hold them down. This practice, however, defeats the purpose of having a relatively simple, easily portable sign stand and also results in an unattractive, unreliable and bulky device. Also, sometimes the curb stands are bolted to or embedded in the surface they are on, but they then cease to be portable and freestanding when that is done. (Sarkisian St. 4; Reams St. .4)

27. When sign stands tip over, they invariably will be damaged with the sign panels and supporting apparatus being bent and often destroyed. Also, curb signs are usually placed along roadways and public right-of-ways for maximum visibility. If one of these is blown or slid into the path of traffic, which is not uncommon, the consequences to the vehicles and persons involved, not to mention the damage to the sign itself, are readily apparent. (Sarkisian St. 4; Reams St. 4-5)

28. When used in the construction industry in particular, freestanding curb signs are used as warning signs -- both to protect the construction workers and the public passing by. Again, the serious consequences to the construction workers and the public from warning signs which are turned over and thus not readable, or are slid to positions where they should not be, are apparent. Where "A-

frame" or "I-frame" type construction warning signs are utilized today, they have to be weighted down in some manner, usually by sand bags, to prevent them from being tipped over by the wind. Thus, substantial time, labor and expense are devoted by the construction crews merely in transporting, positioning and later picking up the sand bags (Sarkisian St. 4-5; Melesio St. 4-5; Tr. 61-62)

29. The improvement of the patented sign stands over conventional "A-frame" and "I-frame" sign stands was shown dramatically at trial. Plaintiff previously, in 1967 and again in 1977, conducted wind tests behind an airplane which compared the operation and performance of the patented sign stands with various types of conventional sign stands. These tests were filmed and the film was shown at the trial. (PX 72, 72A; Tr. 16-24) At relatively low wind forces, on the order of 20-30 miles per hour, the conventional sign stands either blew over, "walked" backward a significant distance, or "walked" backward and also turned sideways to the wind flow. In one case, an "A-frame"-type sign stand was first blown over to a collapsed condition, and then picked up, violently torn apart, and thrown many hundreds of feet by the wind forces. In another case, an "I-frame"-type sign stand with a hanging pendulum sign was tipped over at a relatively low wind force and then carried downstream by the wind many hundreds of feet. In contrast, the patented "WindMaster"-type sign stands performed perfectly in wind forces that reached as high as 80 miles per hour. None of the "WindMaster" construction and general purpose sign stands walked, tipped-over or turned sideways; all of them remained stable and precisely in place. (PX 72, 72A; Tr. 16-24; Sarkisian St.. 7-8; Broff St. 5-7; Beaman St. 3-4)

30. The patented sign stand solved the major problems and satisfied the long felt need for wind stability combined with ready portability theretofore present in the outdoor sign stand industry. Although various other types of prior art sign stands were demonstrated and cited by defendants at trial, none was successful in solving the wind-stability problems

with unanchored, lightweight sign stands. (Melesio 3-4; Reams St. 5; Sarkisian St. 2-5)

31. The prior art relied upon by defendants in their attack on the validity of the '696 and '482 patents is no more pertinent than that considered in the Patent Office during the prosecution of the two patents in suit. (Tr. 225-226; PX 77;

Beaman St. 2-3; PX 50)

32. The prior art references relied upon by defendants are at best merely cumulative to the references before the Patent Office which were considered by the Patent Examiner. This is clearly shown in a chart prepared by plaintiff's expert witness, Mr. Beaman (PX 77). That chart compared each of the eighteen references cited by defendants and analyzed them relative to the five interrelated features and advantages of the Sarkisian patents (see Finding No. 10). Only three of the defendants' references, namely Thomson, No. 1,541,200, Mueller, No. 1,750,118 and Bigelow No. 1,256,349, disclosed or suggested as many as two of those features. However, the Thomson and Mueller patents were before the Patent Office during the prosecution of the patents in suit, while a review of the Bigelow patents shows that it is even less pertinent than these other two patents. (Tr. 219-226; PX 77; DX 509, 511).

33. Not one of the prior art patents relied upon by defendants discloses a construction having more than two of the five features and advantages of the Sarkisian patents referred to above, and not one of the prior art patents discloses or embodies one of the important features of the sign stand disclosed in the Sarkisian patents, namely the adjusting of the preload or initial tension of the springs, to correlate, for signs of different sizes, the intial deflection of spring-supported signs with the force of the wind. (Chart PX 77; Tr. 219-226)

34. Perhaps the most pertinent prior art patent cited by defendants which was not before the Patent Office is Trump, No. 2,144,038. However, that patent relates to a spring mounted aerial which is permanently affixed, that is, anchored, to vehicles, particularly tanks. The aerial spring has

some residual tension imparted between the coils which is used to protect the aerial against the mechanical violence of roughground, vibration and collision. (Beaman St. 2; Tr. 141-142, 148-149; DX 522)

35. Sarkisian, of course, was not the first to develop a portable sign sand suitable for outdoor use. The structures shown in the Mueller and Bigelow patents, as well as the Webb patent, No. 626,256, relate to such prior art efforts. Also, the use of one or more springs to return a sign to a vertical position, following impact or collision, was known in the patent literature prior to Sarkisian's invention. For example, Hood, No. 2,165,704, Watts, No. 1,267,021 and Watts No. 1,487,635, illustrate this. However, in these as well as in all of the other patents cited by the defendants, the Sarkisian concept of a readily portable, unanchored sign stand, stable under high wind conditions, and capable of having a virtually weightless base, is wholly lacking. (Beaman St. 2-3; DX 510, 511, 512, 516, 517, 520).

36. Defendant took the position at trial that the prior art sign stands having weighted bases were "unanchored" and "readily portable". Patents showing this type of sign stands are Hood, Bigelow, the two Watts patents, and Donovan, No. 2,164,680. Mr. Beaman's uncontroverted testimony, however, based on his own personal observation and experience, as well as his expert opinion, explained that the defendants' position had no merit. The bases on these prior art structures were purposely made as heavy as necessary, on the order of 50 - 75 pounds, to prevent them from being tipped over if struck by a vehicle. The substantial weight and size of the bases also prevents them from being picked up easily; usually they are rolled from one position to another. (Tr. 206-207) Thus, these structures are effectively anchored, not readily portable, and do not disclose or suggest the concept of the Sarkisian patents in suit. Moreover, the weight of the base of each of these prior art patents is absolutely necessary for stability of the structure. (Tr. 150-152, 206-207, 401-402; DX 510, 516, 517, 520, 524)

37. Defendants own technical expert witness, William P. Allen, admitted at trial that in none of the prior art patents cited by defendants was the weight of the base irrelevant to the stability of the device. All of the various prior art sign stands either were anchored (i.e., fastened) to the ground, or relied upon the weight of the base to maintain their stability. On the other hand, Mr. Allen admitted that the Sarkisian sign stand base could be as lightweight as possible within the confines of necessary rigidity, and thus the weight of the base was of no consequence for stability. (Tr. 401-402).

38. There is no evidence that any of the various sign stands and devices disclosed in any of the prior art references cited by the defendants, with the possible exception of the Thomson patent which discloses a relatively convention "I"-type sign stand (DX 509), was used commercially. This is particularly true relative to the few spring mounted structures in the patent literature. The defendants' references thus must be considered "paper patents".

39. Plaintiff's film depicting the performance of the "WindMaster" sign stands and the comparison between such sign stands and conventional (prior art) sign stands was an accurate representation of the subject matter (Tr. 219). In fact, at trial, the dependants did not object to the film or the tests on that basis; in fact it would have been difficult to do so since the tests were initially set up and certified by an independent testing company, Detroit Testing Laboratory, Inc., of Detroit, Michigan (PX35). The defendants only alleged fault with the plaintiff's tests was that comparison tests with any spring mounted sign stands were made. Indicated above, however, there are not any spring mounted sign stands commercially available (other than the "WindMaster" and accused devices in suit). The testimony of Mr. Reams, who had over twenty years of experience and knowledge in the sign stand industry prior to 1967, affirmed this (Tr. 50). Moreover, Mr. Beaman made and tested a scale model of a spring mounted sign stand in accordance with the Hood patent and testified that it performed and operated in a

substantially different manner than the Sarkisian invention. (Tr. 192-196) In the Hood sign stand, the. mass and weight of the base prevents it from being displaced when the sign is deflected (Tr. 216). (PX 35, 37, 72, 72A; Tr. 5O-51, 219; Sarkisian St. 7-8; Broff St. 5-6)

40. Prior to the invention of the sign stands disclosed in the Sarkisian patents in suit, there was nothing in the very old sign stand art that suggested how one could make a sign stand that was unanchored, readily portable, spring mounted, stable under all wind conditions, had a sign display which would not oscillate back and forth and would not deflect until shortly before the entire stand would otherwise tip over, had a virtually weightless base, and correlated the preloading of the springs to the characteristics of the other components. After Sarkisian' solution is known, it might be possible to take bits and pieces of an assortment of prior art devices from many different areas and come up with a sign stand resembling Sarkisian's. There is no evidence that anyone thought of or suggested such a device, however. Further, the fact that no one did in over seventy-five years (the 1899 Webb patent (DX 512) is the earliest reference relied upon by defendants), is clear evidence that Sarkisian's solution to the wind problem in the outdoor sign stand field was not an obvious concept. (Beaman St. 1-4)

41. There also is no evidence that anyone suggested or used at all prior to 1967 single extension-type coil springs with initial preload in the manner or for the purpose devised by Sarkisian. Pre-loaded closely wound helical extension springs, although known in the prior art, had found very little application prior to Sarkisian's development of the "WindMaster" sign stand (Tr. 147). Mr. Beaman found, from his study of the spring art, that the "WindMaster" concept uses such a spring in an unusual manner not found elsewhere in the art (Tr. 214-215). Defendants' expert, Mr. Allen, did not contradict this testimony as he could point to no specific instance in which a spring of this type had, without the use of a secondary or auxiliary spring or other artificies been used

for the purpose and in the manner utilized by Sarkisian in his sign stand. (Tr. 373-374; 418,422).

42. Full and careful consideration has been given to the scope and content of the prior art represented by the references cited by the defendants, to the differences between the prior art and the claimed subject matter of the Sarkisian patents, and to the level of ordinary skill in the art.

43. There is nothing in the prior art which would lead one of ordinary skill in the art prior to the Sarkisian invention to have conceived that invention. The Sarkisian invention would not have been obvious at the time it was made to a person having ordinary skill in the art.

44. Defendants offered no testimony from persons skilled in the art that the subject matter of the Sarkisian patents would have been obvious. The only witness who attempted to do so was defendants' expert, Mr. Allen, who was a professional engineer without any skill, background or knowledge in the sign stand art, and who applied an improper and unfounded standard in evaluating and analyzing the validity of the Sarkisian patents. In Mr. Allen's erroneous view, a patent is invalid if all of the components of the patented device are readily available in the marketplace (can be purchased commercially), while a patent is valid, (like his own issued U.S. patent on a collapsable projection screen) if any of its parts are not readily available (i.e., have to be hand or specially made). (Tr. 373-378; 429-435)

45. In contrast, plaintiff presented at trial the testimony of a number of witnesses who all testified in various degrees as to the unobviousness of the Sarkisian invention. Probably the most important of these witnesses was Bernard L. Reams, the President of Allen-Morrison, Inc., of Lynchburg, Virginia, which is the largest company in the nation in the outdoor sign stand field. Mr. Reams had over twenty years of experience in the sign stand field prior to Sarkisian's invention in 1967 and testified that he was both surprised and impressed with the patented invention when he saw it. He stated that it was a

"completely innovative, unique development" in the field that "solved completely the long-standing problems of free-standing curb stands sliding or blowing over in windy conditions". He went on to conclude that Sarkisian's development was an important and meritorious improvement in the outdoor curb stand field". (Reams St. 1-5; Tr. 47-51)

46. Mr. Ruben Melesio, the Vice-President of Warning Lites of Illinois, of Addison, Illinois, had many years of experience and familiarity with construction-type sign stands before he first saw any of the "Windmaster"-type construction sign stands. He testified that the "Windmaster" concept was a very meritorious idea and overcame the serious problems theretofore prevalent in the construction industry of warning signs constantly blowing over in the wind. The "WindMaster" sign stands eliminated the costly, routine and laborious task of weighting down each and every warning sign and barricade with cinder blocks, sand bags or similar heavy objects. Mr. Melesio opined that the "WindMaster" sign stands eliminated the cost and time of one extra worker and one extra truck for every 20 warning signs used on each highway construction job. (Melesio St. 1-5; Tr. 60-62; PX 40)

47. Also, plaintiff's expert, Mr. Beaman, who is a patent attorney with over forty-five years of experience in evaluating and analyzing patents, and in conducting infringement and validity investigations, testified that he did not find the concept of the Sarkisian invention disclosed or suggested in any manner in the prior art. Further, based on background, expertise and reasonableness of position, the testimony of plaintiff's expert, Mr. Beaman, is much more persuasive and entitled to much more weight than the testimony of defendants' expert, Mr. Allen (Beaman Statement of Qualifications; Beaman St. 2-3).

48. The testimony of Clifford A. Sousa, the manager of Marketing Operations of Phillips Petroleum Co., of Bartlesville, Oklahoma, and Robert S. Broff, Product Manager for Marketing Displays, further supports the unobviousness of the patented invention. Mr. Sousa

purchased a large number (8,500) of "WindMaster" units in 1969 for all of the Phillips Petroleum service stations through the country because his company found that they were much more "advantageous and safe" than any of the conventional types of curb displays previously known and used for service stations and related enterprises. Mr. Broff, while in the United States Air Force in 1973 and head of part of its national advertising program, tested and evaluated all of the then commercially available sign stands and selected the "WindMaster" units for purchase by the Air Force because such units had "far more benefits and advantages than any other type or form of sign stand". Over 3,300 of these unanchored, readily portable "WindMaster" sign stands were purchased by the Air Force and positioned at all of their recruiting offices throughout the nation. (Sousa St. 1-2; Broff St. 1-4)

49. The Sarkisian invention achieved unique, beneficial, unexpected and surprising results. This is evident from its operation and performance, its differences over the teachings of the prior art, and the recognition and tribute accorded to it the industry. Moreover, the uncontroverted testimony of Mr. Reams, a person of ordinary skill in the art, brought out that he was "very surprised" that the "WindMaster" sign stands performed like Mr. Sarkisian stated that they would. Mr. Reams also stated that the Sarkisian sign stands performed in a manner that was "unexpected" and different, from his knowledge and skill in the art up to that time (1967). In fact, in order to check on the accuracy of and substantiate Sarkisian's claims that the "WindMaster" units would not walk or turn over in high wind conditions, Mr. Ream's company, Allen-Morrison, tested the units behind an airplane. The "Windmaster" units performed precisely as stated. (Reams St. 1-5; Tr. 47-51)

50. Sarkisian's inventive "Windmaster" sign stands have achieved wide-spread recognition and success in the marketplace. As stated earlier, the first sales of the "WindMaster" units were made in late 1967 and Marketing

Displays has sold over $2,200,000 of them to date. These sales have been to such well established companies as Amoco, Continental Oil Co., Exxon, Sun Oil Co., Dr. Pepper, Coca Cola, Phillips Petroleum, General Motors Pontiac Division and the U.S.A.F., and the sign stands have been used by these companies at various retail outlets, service stations, dealerships, recruiting offices, and construction sites, throughout the United States. (Sarkisian St. 8; Sousa St. 1-2; Broff St. 1-4; PX 18, 20)

51. The wide-spread recognition and universal acceptance that the "Wind-Master" sign stands have achieved is also shown in many other ways:

(a) In April, 1977, Penn-Chem Corp., of Lancaster, Pennsylvania, entered into a royalty-bearing license to manufacture and sell sign stands under the '696 and '482 patents. (O'Brien St. 3; Sarkisian St. 9; PX 47)

(b) Further, in February, 1975, a competitor, Thomas Display Holders, Inc., of Wilkes-Barre, Pennsylvania, in terminating an action for patent infringement commenced in 1972 in the Federal District Court in Pennsylvania, entered into a Consent Judgment admitting infringement of both the '696 and '482 patents. (Sarkisian St. 9; PX 38)

(c) In September, 1976, Sunset Manufacturing Co., of Tualatin, Oregon, who had been one of the original defendants in the present action, entered into a Consent Judgment and Injunction which admitted infringement and validity of the two patents in suit. Sunset Manufacturing had manufactured a number of "Winn-Proof" and "Winn-Safe" sign stands for defendants Werner and Winn-Proof. Also, two of the principal owners and officers of Sunset at that time, namely Jim and Ron Warren, were, at the same time, majority stockholders of Winn-Proof. (PTO II, 12; Warren St. 1-2; Sarkisian St. 9)

(d) In addition, approximately twenty companies in the sign and construction industries, including many of the largest in the United States, have become distributors or customers of the "WindMaster" sign stands. These companies include Allen-Morrison in Lynchburg, Virginia, Warning Lites of Illinois in Addison, Illinois, Stout Sign Co. of St. Louis, Missouri and Cassel Company, Inc., in Napa, California. (Sarkisian St. 9-10; Reams St. 2; Melesio St. 1)

52. Throughout the ten years of existence of the "Windmaster" sign stands, neither Sarkisian or Marketing Displays have ever received any complaints concerning their performance or quality. At the same time, many compliments, testimonials and letters of commendation concerning the "WindMaster" products were received. For example, the "WindMaster" concept has won two industry awards for innovation of design and use. These products were presented with two "P.O.P.A.I." awards from the Point of Purchasing Advertising Institute. That industry association is comprised of most major national advertising and marketing businesses and companies which design, use or have an interest in point-of-Purchase products and displays. The "WindMaster" program or the United States Air Force won the first P.O.P.A.I. award in 1973, and the "WindMaster" program for Amoco won the second one in 1975. (Sarkisian St. 10)

53. The defendants themselves have stated that the accused sign stands are a vast improvement over prior sign stands. The defendants' advertising literature and oral comments to others state that their accused sign stands do not need sand bags or other weights on them to keep them from turning over, are readily portable, are easy to store, and are virtually impossible to tip over. Werner considers these devices a technical "breakthrough" in the highway construction field and has represented them to others as an "amazing" product. (Tr. 330, 334-337; PX 3, 8, 14, 26, 30, 53)

54. The recognition and commercial success achieved by Sarkisian's "WindMaster" products, the satisfaction by the "WindMaster" products of the long felt need in the sign stand industry for an outdoor, unanchored sign stand which would not walk or tip over in high wind forces, and the prior unsuccessful attempts by others to develop solutions to that problem, all support the conclusion that the Sarkisian concept was unobvious and constituted a patentable invention.

55. There are a number of models of the defendants devices in suit, all of which are alleged by plaintiff to infringe the cliams in issue of the '696 and '482 patents. In particular, Winn-Proof (and its successor, Winn-Safe) manufactured and sold sign stands under the names "Winn-Proof", "WP" and "Winn-Safe" and identified as models WP-30, WP-32, and WP-48. Defendant Wer-Nel has manufactured and sold, and is currently manufacturing and selling, sign stands under the name "No-Tip" and identified as models NT-36 and NT-48. Wer-Nel also has sold many of the "WP" models and still sells them on special order. (PTO II, 10-11; PX 3-6, 8, 9, 14, 26, 27, 53, 67, 68; Tr. 325-328; DX 603)

56. All of the defendants' accused products comprise unanchored, readily portable sign stands which are used in the outdoor construction industry. Although there are minor structural changes between the models of the defendants' products the basic elements and features are the same, and they all function and perform in the same manner. (Tr. 328). Each of the accused products has an upstanding sign display connected to an elongated unanchored base member by at least a pair of pre-loaded compression coil springs. The upstanding sign display comprises a construction sign mounted by one or more brackets to a vertical post or an arch-type structure. The size, strength and pre-load of the coil springs is provided in relationship to the size and weight of the sign display, the height of the sign display, the weight of all of the various components, and the length of the legs of the base. (PX 67, 68, 3-6, 8, 9, 14, 26, 27, 53 DX 603; Tr. 310-312, 325-328; PX 72, 72A; Beaman St. 3-4)

57. Plaintiff conducted tests of the accused products, showed the results of the tests on film at trial, and presented uncontroverted testimony which showed the operation and performance of representative models of the accused devices. When placed side-by-side in the propeller wash of an airplane next to various models of the "WindMaster" sign stands, the accused products performed in substantially the same manner as the "WindMaster" units. All of the accused and the "WindMaster" sign stands remained stable under the highest wind conditions to which they were subjected, on the order of 80 miles per hour. The only departure in the comparative performance of the units was that in one extended position of the defendants' "No-Tip" sign stand, which configuration was outside the stated relationships in the Sarkisian patent teachings, the unit did tip over in high wind conditions. (Beaman St. 3-4; Broff St. 5-6; PX 72, 72A)

58. With respect to claims 3 - 5 of the Sarkisian '696 patent which call for a predetermined degree of compression pre-loading between the coils of the springs, plaintiff's expert Beaman made a demonstration stand for testing pairs of springs taken from the commercial sign stands of the parties. Mr. Beaman demonstrated his test stand at trial and showed that sets of springs taken from competitive models of the parties sign stands have substantially the same residual stress, or compressive pre-loading, between the coils of the springs. (Beaman Tr. 119-124; PX 71; Beaman St. 4)

59. In both of the parties products, the pre-loading of the coil spring arrangement is modified according to the size and weight of the sign display and the other sign components. Marketing Displays has a number of sizes of coil springs having different amounts of compressive pre-loading which it utilizes for its "Windmaster" sign stands of various sizes and weights. The defendants accomplish the same result by simply adding another coil spring in their largest and heavier models. (Tr. 123; 273-274; PX 3-6)

60. All of the defendants' accused products, and each and every feature thereof, is the full equivalent of the patented

sign stands and thus all of the defendants' models infringe the claims in suit of the Sarkisian patents. The accused products contain substantially all the same elements, perform in substantially the same manner, and achieve substantially the same result as the Sarkisian invention. (Beaman St. 3-4; Tr. 118, 182).

61. All of the defendants' "Winn-Safe" and "Winn-Proof" WP-30, WP-32 and WP-48 Sign Stand models fall within the literal meaning of all of the terms of the claims in issue and thus are infringements for this reason also. (Beaman St. 3-4).

62. Notwithstanding the above, defendants deny infringement on three grounds. These arguments however, are based on a strained and unreasonable interpretation of terms in the patent claims, and are not supported by the file history, disclosure and meaning of the patents. Defendants' first contention that the legs of some of the accused sign stands (the "No-Tip" models) are not "generally parallel" has little substance. First of all, such an argument only relates to claims 3-5 in issue of the '696 patent, as none of the claims of the '482 patent contain that term (PX 2; Tr. 215). Secondly, although the legs of these sign stands are not precisely parallel, they are, as Mr. Beaman testified, "generally" parallel (Tr. 183). The points and planes of support along the ground are the same. In any event, the feature of angling the legs slightly was a minor structural change for storage compactness of the units, does not depart from the spirit and scope of the Sarkisian patents, and results in a structure which is the full equivalent of the base and leg structure called for in the '696 patent claims. (Tr. 183, 215-216)

63. Defendants' second argument of noninfringement relates to the term "spaced-apart" as it applies to the location of the springs (Allen St. 21), and similarly has no substance. The term "spaced-apart" appears in all of the claims at issue and was included during the prosecution of the patents to distinguish from concentrically-mounted springs and to bring out the feature of the invention that the sign display will

deflect only in predetermined directions (along the lengths of the legs) (Tr. 216-128). The location and position of the coil springs on the accused devices is in full accordance with the meaning and scope of the term "spaced-apart" in the Sarkisian patents. The springs themselves, as well as the axis-of their centers, are "spaced-apart"; none of the defendants' sign stands have their springs concentrically mounted. Moreover, defendants' argument only relates to one of their most recent model sign stands in which the coil springs are in side-by-side contact at one or more points along their lengths (DX 592); the coil springs in all of the other accused models, including all of those produced prior to the commencement of the present action, are not in touching engagement. As to this current version, the purpose of providing a pair of springs to avoid twisting and cantings is the same as the "WindMaster" concept and thus these models are the full equivalent of the Sarkisian invention. (Tr. 197-199, 216-218, 340-342; Sakisian '696 patent file wrapper, Px. 49, pg. 27)

64. Defendants' expert, Mr. Allen, testified that in his opinion touching springs are not spaced apart. That opinion can be given no weight since Mr. Allen testified that he had not read the file histories of the Sarkisian patents (which is a requirement under the Patent Law in order to determine the scope and meaning of patent claims), did not know that the term "spaced-apart" was included in order to distinguish from concentric springs, and could not think of a better term to use to distinguish from concentrically mounted springs (Tr. 402-409, 357-358; Allen St. 2, 21).

65. Defendants' final contention of non-infringement - relates to the feature in the claims that the sign stands have an upstanding frame structure with a relatively large surface area for receiving display indicia (Allen St. 20-21). Defendant claims that its construction-type sign stands with an upstanding post or arch for mounting highway warning signs does not meet that language. Such a literal interpretation of the patent claims, especially when applied to defendants' sign stands in their incomplete form and apart from their only

intended use, is unreasonable. Mr. Beaman had no difficulty interpreting the claims to apply to the accused sign stands in their completed form, that is, where the sign itself forms a part of the frame (Tr. 186-188). In this regard, Werner admitted that in all but a "couple" of cases, his sign stands have been sold with, used with, or intended for use with, highway 'signs which have a relatively large surface area and display warning indicia for passing motorists (Tr. 332-334). The accused sign stands thus have the full equivalent of the feature in question.

66. Moreover, the Sarkisian concept was incorporated in construction type sign stands as early as 1968 when Market-in Displays designed a "WindMaster" unit for General Machine Products of Trevose, Pennsylvania to hold warning signs along road construction sites. That unit had individual folding legs, coil springs set close together, and an upstanding post with brackets on it for holding highway warning signs. (Tr. 247-249; Sarkisian St. 12.; PX 54, 55).

67. The little merit and weight to be given defendants' arguments of noninfringement is further shown by the fact that three patent attorneys, on different occasions and on their initial consideration of the matter, advised Werner that the Sarkisian patents were infringed by the defendants' accused sign stands. (PX 10; Tr. 286, 317, 323-324). Mr. Beaman, with over forty-five years as a patent attorney, similarly had no trouble concluding that the accused sign stands marketed by defendants incorporate the teachings of both of the Sarkisian patents and thus infringe all of the claims in issue. (Beaman. St. 3-4).

68. The defendants sign stands were developed around January, 1975. Werner, together with his two partners at that time, Fred Leach and Richard ("Ed") Hensley (PX 43), developed the first prototypes of the accused products in Hensley's father's barn. Various parts and components were tried and proven until they came up with an acceptable working model. Although there is some conflict in the testimony as to who developed or suggested many of the

features and components of the defendants' sign stands, the witnesses agreed that at least as to the spring-actuated hinge pin leg locking arrangement, that this was suggested by Leach. Also, neither Leach nor Hensley recalled that Werner suggested any specific elements for the design, other than possibly having the initial idea to develop a construction-related product to market. (Leach St. 2; Hensley St. 2; Tr. 70, 302, 310-312) It is also prudent to note that Werner later filed a patent application in his own name on the sign stand (PX 59, 60, 61) notwithstanding that it was admittedly developed jointly by the three partners, and further that the patent which issued from that application, U.S. No. 4,038,769 (PX 80), is directed to the spring-actuated hinge pin leg locking arrangement which Werner admitted was Leach's concept (Tr. 302). In this same vein, it is noteworthy to point out that Werner believes that his combination patent constitutes an "invention" (Tr. 307-308), while in this suit, he is vigorously contending that Sarkisian's patents do not.

69. In January, 1975, before any of the defendants began to manufacture and sell any of the accused sign stands, Werner, Hensley and Leach secured advice from Mr. Kenneth Klarquist, a patent attorney in Portland, Oregon, relative to the possible patentability of their sign stands. In early February, 1975, Klarquist advised them that patent protection could not be obtained on their device due to the existence of the two Sarkisian patents. Klarquist also advised them that their device infringed at least the '696 Sarkisian patent and possibly the '482 patent as well. (PX 10; Tr. 92, 317; Leach St. 2-3; Hensley St. 2-3)

70. In Mr. Klarquist's opinion letter, he also expressed some reservation as to the validity of one claim of the '696 patent; however, that reservation was mere wishful expectation and not founded on any substance, such as a validity search or prior art that was more pertinent than that considered by the Patent Office. If fact, Werner admitted that Klarquist from the very first advised that a validity search be conducted as a basis for an informed validity opinion, but the

defendants did not act on that advice until long after the present suit was commenced. Further, at no time prior to this suit did the defendants ever receive even the slightest indication that an attorney had any reservations concerning the validity of any of the claims of the '482 patent. (PX 10; Tr. 317-318).

71. Partly as a result of the Klarquist opinion, as well as the fact that Werner never paid his share of the partnership expenses, the partnership between Werner, Hensley and Leach broke up. Hensley and Leach contacted Sarkisian in an attempt to secure a license under the patents in suit and eventually reached an agreement with Sarkisian whereby they became a distributor, called H & L Industries, Inc., of the "WindMaster" sign stands (PX 11, 23). Werner meanwhile, made one brief contact with Sarkisian relative to a possible license, but soon abandoned that attempt and proceeded on his own with the manufacture and sale of the accused sign stands. (Leach St. 3-4; Hensley St. 3-4; PX 44, 45; Tr. 321; PX 12, 13)

72. Prior to initiating the present suit, Sarkisian contacted Werner and attempted to resolve their differences. It is apparent that it is Sarkisian's policy to offer to license his discoveries to others. However, Werner remained fixed in his position to continue to manufacture without a license under the Sarkisian patents. (Sarkisian St. 11; Tr. 321-323)

73. The defendants, by flagrantly proceeding with the manufacture and sale of the accused sign stands, despite advice from three separate patent attorneys that such sign stands infringed the Sarkisian patents in suit, and with an untenable and unsupported position on the validity of the patents, have willfully and wantonly infringed Sarkisian's patent rights. PX 10; Tr. 285-286, 323-324)

74. The willfulness of the defendants' conduct and disregard for the rights of others, is also shown by Werner's repeated failure to fully and accurately inform others, such as potential investors in his various enterprises, licensees of his

"patent rights", and prospective and actual customers of his products, of the situation with Marketing Displays and Sarkisian, and the limited scope of defendants, "patent rights". Indeed, Werner led Mr. Floyd Lacey, an Oregon State Highway Department Engineer, to believe that it was Werner who had the patent rights on the sign stands and that the present suit merely involved the question as to who owned the rights in the patents. (Warren St. 2-3; O'Brien St. 1-3; Hensley St. 4; Leach St. 4-5; Melesio St. 2-3; Ty. 62-63, 243-244; Sarkisian St. 11-12)

75. Defendant Werner and his various companies have repeatedly attempted to mislead and deceive the public as to the patent status of the accused products. In June, 1975 three months before Werner ever executed and filed a patent application relating to the accused sign stands, Werner and Winn-Proof marked the labels on their products with the term "patent pending". One month later, these defendants distributed brochures to the public which also included the term "patent pending". (PTO II, 13; Tr. 312-315; PX 31, 59, 61, 62, 80).

76. Werner attempted to justify his conduct and thus deny attempting to mislead the public, by denying knowledge of the true meaning of "patent pending". The evidence shows otherwise. Werner admitted that he knew that "patent pending" meant that a patent was being applied for and that he was in formed in this regard by his attorney when he first asked, in April, 1975, that an application be filed. His excuse that he initially thought the term meant that it applied the moment he went to his patent attorney (Tr. 315) is flimsy and unreasonable. Werner first secured the advice of one patent attorney, Mr. Kenneth Klarquist, in January, 1975, relative to various patent matters. He then switched to another patent attorney, Mr. John Stuart, in Apri1, 1975 and again secured advice relative to various patent matters, including the meaning of "patent pending". In between, Werner sought the advice of a general attorney who counseled him on patent licensing matters (PX 12, 13). Since Werner was acutely

interested in filing a patent application on his "own" device and was knowingly infringing the Sarkisian patents at the same time (Tr. 317), it can be inferred that he also knew and understood the true meaning of "patent pending" and that he purposely included that term on his labels and brochures in June and July, 1975 to mislead the public (PX 10, 75, 76; Tr. 312-315)

77. Werner's intent in this regard is further shown by the eagerness in which he informed prospective customers that he was seeking patent protection on his products or had patent protection on them, as well as by his numerous and repeated attempts to license others under his "patent rights" (Sarkisian St. 11-12; Leach St. 4-5; Melesio St. 2-3; Hensley St. 4; 0'Brien St. 1-3). Moreover, Werner's bad faith is shown by the fact that he informed Melesio that his product was "patented" when he only had an application pending at the time, and that he led Melesio to believe that his patent rights covered his entire product and not only a minor element on the products, namely spring actuated pivot legs. (Melesio St. 2-3; Tr. 61; PX 80) In attempting to "license" others, Werner also failed to inform them about the existence of the Sarkisian patents and the conflict which would arise thereafter with Sarkisian and/or Marketing Displays. (Melesio St. 2-3; O'Brien St. 1-3).

78. The defendants' claim that Sarkisian practiced fraud on the Patent Office by not disclosing to the Patent Office each and every patent found in a patentability search, has no substance. Of the five patents turned up in that search, two, Mueller and Hood, were before the Patent Office during the prosecution of the patents in suit (one was turned up by the Examiner and one was brought to his attention by Sarkisian) and the other three have very little pertinency. In fact, the lack of pertinency of the latter three patents is shown by the failure of the defendants to even rely on two of them in this case and to treat the third one (Watts '635) only secondarily at trial. (PTO 11, 8; PX 1, 2, 77; DX 510, 511, 517; Tr. 225-226)

79. The defendants claim that Sarkisian perpetrated fraud on the Patent Office by failing to mention in the '482 oath that the "WindMaster" devices had been sold prior to 1970 is similarly baseless. As found earlier, the '482 application is related to and entitled to the 1967 filing date of the '696 (except for the disclosure relative to the flat spring embodiment) It thus was of no consequence that "WindMaster" devices made in accordance with the '696 application were sold prior to the filing of the '482 application. (See Findings 16-23)

80. Defendants further contend that the claims of the patents in suit are invalid because the phrase "frame structure having a relatively large surface area for receiving display indicia" is vague and indefinite. The evidence is overwhelmingly to the contrary, however. When viewed in context of each claim as a whole, and when interpreted in light of the specifications and drawings of the patents in suit, the meaning of every phrase in all of the claims is clear and unconfusing. The claims call for a sign stand having a number of interrelated and cooperating features. The phrase in question merely states that one of these features comprises a display sign of sufficient size such that it would cause the entire sign stand to tip over when exposed to a high wind if the display sign did not bend downwardly (Tr. 208-209). Not only did the Patent Office not raise any question as to the claim terminology, it is noteworthy to point out that the defendants' prior patent counsel, Mr. Klarquist, did not have any problem understanding Mr. Sarkisian's invention and the terminology used in the patent claims when he informed Werner, in February, 1975, that the defendants' sign stands infringed the Sarkisian patents. (PX 1, 2, 10, 49, 51; Tr. 115-117).

81. The disclosures and claims of the patents in suit are adequate to enable one skilled in the art to understand and practice the invention. Mr. Beaman testified that he had no great difficulty in understanding the "WindMaster" sign stand concept, as embodied in the claims in suit. He stated that the

patent disclosures were sufficient to teach one skilled in the art how to construct an unanchored, readily portable sign stand which would not be displaced by high wind conditions (Beaman St. 4; Tr. 138, 140-144, 160-161, 178, 207-209). Mr. Allen agreed as he expressed no problem, despite the fact that no numerical information was provided in the Sarkisian patents on sign stand parameters, in understanding how persons could take the patents and construct the springs involved, as well as build a sign stand that would function as desired to bend in the wind and not blow over. (Tr. 360-362).

82. The formulation in the '482 patent is accurate and fully understandable, and also is a reasonable manner in which to express the interrelationship between the various features and components of the Sarkisian invention. Mr. Allen apparently had difficulty in understanding the formula, although Mr. Beaman and the patent attorneys who advised Werner of infringement, as well as the Patent Office Examiner who examined and issued the patents, did not have that same trouble. From the testimony elicited at trial, it became clear that Mr. Allen's analysis was based on an unrealistic and unreasonable interpreatation of the formula. Although he regarded the formula as nothing more than a scientific truth or axiom and conceded that a first-year engineering student could readily handle the analysis of the moments and forces involved in evaluating the stability of the "WindMaster" sign stands, Mr. Allen attempted to analyze the formula and apply its terms only when the sign stand was upright -- a condition in which its stability against tipping is of no concern. The more reasonable and meaningful way to interpret the formula is to apply it to the sign stand when the sign display is in the horizontal, deflected position and the moment arm relating to the weight of the sign display is also horizontal. (Allen St. 16, 17; Tr. 138-140, 230-231, 379-393)

83. Marketing Displays marks its "WindMaster" products with the numbers of the two patents in suit and has continuously done so since the patents issued in 1972. (Sarkisian St. 12)

84. Sarkisian sent several letters to persons in the trade which put the recipients on notice of the existence of the present suit and, in proper cases, charged the recipients with infringement of the '696 and '482 patents. It is uncontroverted that the purpose of the letters was to protect Sarkisian's own interests, rather than to injure the defendants' interests. In most instances, these letters were sent because Sarkisian was led to believe that Werner had misinformed many persons in the trade relative to the Sarkisian patents and present lawsuit. Also, all of the statements made in letters were true, and the defendants have not contended or shown otherwise. (Sarkisian St. 11-12; Tr. 263-265; DX 575-586)

85. There is not a scintilla of proof that Sarkisian sent the letters in bad faith or has engaged in any acts of unfair competition relative to the defendants herein. There is also no proof that Sarkisian has ever believed or been counseled that either or both of his patents are invalid for any reason.

86. At trial, defendants' introduced the testimony of Floyd Lacey, an Oregon State Highway Department Engineer, and Melvin Edlund, who is associated with one of Wer-Nel's distributors Renco Supply in Austin, Texas, in an attempt to support a charge of unfair competition. The testimony of those witnesses, however, was rebutted at trial. Edlund's statement was directly contradicted by plaintiff's witness, Broff, who denied making the allegedly damaging statements in question (Tr. 102-104), and Lacey could not remember who had made the allegedly damaging statements to him (Tr. 240-241). In any event, any statements made to Lacey and Edlund, even if along the lines suggested in their direct statements, were proper because they were mere responses to inquiries concerning the present action, did not injure the defendants in any manner, and were factual.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this action, 28 U. S. C. §§ 1338 and 2201, and venue is proper in this District, 28 U. S. C. § 1400 (b).

2. United States Letters Patent Nos. 3, 646, 696 and 3, 662,482 were duly and lawfully issued, are owned by plaintiff, and plaintiff has standing to sue to recover for past infringement thereof.

3. Plaintiff has discharged its burden of proof with respect to the allegations of the complaint. The defendants have failed to meet their burdens of proof relative to the allegations of their answer and counter-claim. Plaintiff is entitled to the relief sought in the complaint and the defendants are entitled to no relief.

4. The two Sarkisian patents in suit are presumed valid, 35 U. S. C. § 282, and that presumption can be overcome only by "clear and convincing" evidence, Hayes Spray Gun Co. v. E. C. Brown Co., 291 F. 2d 319, 322 (9th Cir. 1961).

5. The initial presumption of validity is strengthened where, as here, the Patent Office had the most pertinent prior art references before it when it issued the patents, Saf-Gard Products, Inc. v. Service Parts, Inc., 370 F. Supp. 257 (D. Ariz. 1974), 532 F. 2d 1266, 1271 (9th Cir. 1976), cert. denied 429 U. S. 896, 97 S. Ct. 258, 50 L. Ed. 2d 179 (1976), Mumm v. Decker & Sons, 301 U. S. 168, 171, 57 S. Ct. 675, 81 L. Ed. 983 (1937).

6. The defendants have not overcome the presumption of validity of the two patents in suit.

7. The specification and claims of the two Sarkisian patents in suit fully comply with the requirements of 35 U. S. C. §112. The patents disclose the invention in sufficient manner for persons of ordinary skill in the art to practice it

and the patents particularly point out and distinctly claim the invention.

8. The prior art patents relied upon by defendants are basically paper patents which have limited weight on the question of obviousness, Columbia Broadcasting System, Inc. v. Zenith Radio Corp., 391 F. Supp. 780, 788 (N. D. Ill. 1975), modified on other gnds. , 537 F. 2d 896 (7th Cir. 1976), Eversharp Inc. v. Fisher Pen Co., 204 F. Supp. 649, 671 (N. D. Ill. 1961). Also, the defendants rely on eighteen patents and two literature references to show the alleged invalidity of the two Sarkisian patents; the citation of such a large number constitutes evidence of the futility of prior attempts to solve a problem, and strengthens the unobviousness of the Sarkisian invention. Corometrics Medical Systems v. Berkeley Bio Engineering, 193 U. S. P. Q. 467, 477 (N. D. Cal. 1977).

9. The differences between the claimed subject matter of the Sarkisian patents in suit and the prior art relied upon by defendants are such that the claimed subject matter would not have been obvious, at the time the invention was made, to persons having ordinary skill in the art, within the meaning of 35 U. S. C. §103. Graham v. John. Deere Co., 383 U. S. 1, 15 L. Ed. 2d 545, 86 S. Ct. 684 (1966).

10. The conclusion of non-obviousness is reinforced by the merit and significant commercial success of the patented invention, the long felt need in the industry not solved by others but solved by the present invention, and the tribute and recognition accorded the invention by persons in the industry, Reeves Instrument Corp. v. Beckman Instruments, Inc. , 444 F.2 263, 271-272 (9th Cir. 1971), Cool-Fin Electronics Corp. v. Int'l Electronics Research Corp., 491 F. 2d 660, 662-663 (9th Cir. 1974)

11. Merely because all of the elements of a claimed combination are old does not by itself render the combination invalid. If carried to its logical conclusion, such a rule would "preclude the patenting of virtually every new mechanical...

device since the vast majority, if not all, involve the construction of some new device (machine or combination) from old elements, " Reeves Instruments Corp. v. Beckman Instruments, Inc., 444 F. 2d 263, 270-271 (9th Cir. 1971).

12. To combine the cited references in a manner which would produce a sign stand similar to the Sarkisian invention could only be done with hindsight in light of the teachings of the Sarkisian patents, and this is improper, Goodyear Tire & Rubber Co. v. Ray-O-Vac Co. , 321 U. S. 275, 279, 64 S. Ct. 593, 88 L. Ed. 721, 724 (1944), National Dairy Products Corp. v. Bordon Co., 394 F. 2d 887, 891 (7th Cir. 1968), cert. denied, 393 U. S. 953 (1968). While a particular solution to a problem might seem simple in retrospect, after its disclosure, foresight applied as of the date of the invention is the proper test of invention. The judgment and opinions of persons in the sign stand art, evidencing and recognizing the unobviousness and merits of the Sarkisian invention far outweights the theoretical and technical arguments of defendants who seek to combine evidence from paper patents and present day knowledge and rely entirely on hindsight.

13. Since the claimed invention is carried out by the application of elements proceeding contrary to accepted principles in the sign stand industry - namely-the use of an unanchored, virtually weightless base in place of anchored or heavily weighted bases which were previously utilized throughout the industry - it would not have been obvious to a person having ordinary skill in the art. United States v. Adams, 383 U. S. 39 (1966), Reeves Instrument Corp. v. Beckman Instruments, Inc., 161 U. S. P. Q. 450, 480 (C. D. Cal. 1968), aff'd; 444 F. 2d 263 (9th Cir. 1971), cert. denied 404 U. S. 951 (1971).

14. The formula in the '482 patent is inherent in and thus a part of the '696 patent. Subject matter which is inherent in an application is not a departure from the application and thus does not constitute "new matter". Binks Mfg. Co. v. Ransburg Electro-Coating Corp., 281 F. 2d 252, 257

(7th Cir. 1960), Technicon Instruments Corp. v. Coleman Instruments, Inc., 255 F. Supp. 630, 640-641 (N. D. Ill. 1966), aff'd, 385 F. 2d 391 (7th Cir. 1967), In re Smythe, 480 F. 2d 1376, 1384-1385 (C. C. P. A. 1973). All of the subject matter of the '482 patent, with the exception of that pertaining to Figure 7 (the non-asserted flat spring embodiment), is entitled to the September 11, 1967 filing date of the '696 application, 35 U. S. C. § 120, Saf-Gard Products, Inc. v. Service Products, Inc., 370 F. Supp. 257, 271 (D. Ariz. 1974), aff'd, 532 F. 2d 1266 (9th Cir. 1976), cert. denied, 429 U. S. 896 (1976), Holmes v. Thew Shovel Co., 305 F. Supp. 139, 145 (N. D. Ohio 1969). See also Indiana General Corp. v. Lockheed Aircraft Corp., 408 F. 2d 294 (9th Cir. 1968).

15. The '482 patent is not invalid for double patenting. The scope of the claims of the '696 patent and the '482 patent are not the same, and plaintiff disclaimed and dedicated to the public the end two month portion of the '482 patent so that both patents expire on the same day. The terminal disclaimer by itself prohibits a finding of double patenting because no extension of the patent monopoly beyond the date of the first patent has been made, Saf-Gard Products, Inc. v. Service Parts, Inc., 370 F. Supp. 257, 271 (D. Ariz. 1974), aff'd, 532 F. 2d 1266 (9th Cir. 1976), cert. denied, 429 U. S. 896 (1976). Mobil Oil Corp v. Filtrol Corp., 186 U. S. P. Q. 252, 261 (C.D, Cal. 1975), Pursche v. Atlas Scraper & Engineering Co., 300 F. 2d 467, 481 (9th Cir. 1962).

16. The presumption of administrative correctness within the Patent Office is given much weight on the issue of double patenting. Pursche v. Atlas Scraper & Engineering Co., 300 F. 2d 467, 481 (9th Cir. 1962), Southern Implement Mfg. Co. v. Mclemore, 350 F.2d 244, 249 (5th Cir. 1965), Uncas Mfg. Co. v. McGrath-Hamin, Inc., 265 F. Supp. 1008, 1012 (D. R. I. 1967).

17. All of the defendants' "Winn-Safe" and "Winn-Proof" sign stands, including the WP-30, WP-32 and WP-48 models, fall within the literal meaning of all of the terms of claims 3-5 of the '696 patent and claims 1 and 2 of

the '482 patent and thus are infringements thereof. These accused models also are the full equivalent of the claimed invention and infringe the claims for this reason as well.

18. All of the defendants' "No-tip" sign stands, including models NT-36 and NT-48, are the full equivalent of the patented sign stands defined by claims 3-5 of the '696 patent and claims 1-2 of the '482 patent and thus are infringements thereof. Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U. S. 605, 70 S. Ct. 870, 94 L. Ed. 1097 (1950). Botsolas v. Schultz Laboratories, 351 F. Supp. 188, 191 (C. D. Cal. 1972).

19. The defendants' sign stands which are sold without signs, contributorily infringe the two Sarkisian patents under 35 U. S. C. § 271 (c), and the defendants' activities relative to the sale of such sign stands constitute inducement to infringe under 35 U. S. C. §271 (b), Saf-Gard Products, Inc. v. 'Service Parts,. Inc., 370 F. Supp. 257, 272 (D. Ariz. 1974) aff'd 532 F. 2d 1266 (9th Cir. 1976), cert denied 429 U. S. 896 (1976).

20. The defendants' infringement has been willful, wanton and deliberate, justifying an award of increased damages to plaintiff under 35 U. S. C. § 284 and making this an exceptional case justifying an award of attorney fees to plaintiff under 35 U. S. C. § 285, Saf-Gard. Products, Inc. v. Service Parts, Inc., 370 F. Supp. 257, 273 (D. Ariz. 1970, aff'd, 532 F. 2d 266 (9th Cir. 1976), cert. denied, 429 U. S. 896, 97 S. Ct. 258, 50 L. Ed. 2d 179 (1976). Rayonier, Inc. v. Georgia-Pacific Corp., 156 U. S. P. Q. 110, 125 (W. D. Wash. 1967).

21. The defendants violated 35 U. S. C. §292 by improperly, and with the purpose of deceiving the public, including the term "patent pending" on labels and brochures as early as three months before they filed a patent application. The defendants shall be fined $500 for the offense relative to the labels and $500 for the offense relative to the brochures - or a total of $1,000 - half of which is payable to plaintiff and

half to the United States. Republic Molding Corp. v. Gotham Industries, Inc. , 145 U. S. P. Q. 642, 644 (S. D. Cal. 1956), Precision Dynamics Corp. v. American Hospital Supply Corp., 241 F. Supp. 436, 446-447 (S. D. Cal. 1965)

22. The two Sarkisian patents in suit, U. S. Nos. 3,646,696 and 3,662,482, are in all respects valid and enforceable.

23. Plaintiff has not misused the Sarkisian patents or committed any acts of unfair competition, Hayes Spray Gun Co. v. E. C. Brown Co., 291 F. 2d 319, 327 (9th Cir. 1961), Oil Conservation Engineering Co., v. Brooks Engineering Co., 52 F.2d 783, 785-786 (6th Cir. 1931).

24. Plaintiff has not committed any acts constituting fraud on the Patent Office. "Fraud" is a serious charge and requires proof of unlawful intent, as well as uncontroverted proof that the accused acts were essential material to the issuance of the patent, Bolt Associates, Inc. v. Rix Industries, 178 U. S. P. Q. 171, 173 - 174 (N. D. Cal. 1973), Cataphote Corp. v. DeSoto Chemical Coatings, Inc., 450. F. 2d 769, 771-772 (9th Cir. 1971).

25. Plaintiff is entitled to an accounting to determine the amount of damages due to the defendants' infringement.

26. Plaintiff is entitled to an injunction prohibiting further acts infringement by the defendants.

27. Plaintiff is entitled to an award of interest and costs against the defendants.

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springs 4 would support the sign and that the springs 4 would be sufficient to permit downward deflection of the plate 3.

Specifically, Dobrusskin does not show the following features recited in Claim 1:

1. A base (the Dobrusskin device is intended to be supported by a suitable electrical vibrator device or suspended on a vehicle which will cause vibration thereof.)

2. A spring structure which is yieldable in either direction along an axis generally parallel to the plane of the frame structure to permit downward deflection of the frame structure.

3. A device in which the area of the frame structure is proportioned to the dimension of the base to result in downward deflection of the frame structure upon a force being applied thereto without tipping over the entire display device.

Claim 2 is specifically limited to a pair of spaced apart coil springs whereas Dobrusskin illustrates the use of three springs. This points up the differences in function of the devices because Dobrusskin wishes to have vertical jiggling and thus uses a greater number of spring. Applicant could use three springs but this would unnecessarily increase the cost of the device.

Ser. No. 670,511

Sarkisian

Cancel Claims 6 and 12.

REMARKS

Applicant's attorney wishes to express his appreciation for the courtesy extended by Examiner Carter during the telephone interview of January 6, 1970. In the course of the interview, applicant's attorney set forth the physical facts, including the statics involved, which are believed to result in patentability of the combination expressed in Claim 1 as amended. As indicated to the Examiner, a relatively formal analysis of the statics involved in the present case has been developed. Basically, in connection with the present invention, leverage has been utilized to prevent tipping or falling over of the poster display device as opposed to the use of heavy weights or anchoring as in the prior art. The use of a pair of spring connections as opposed to a single spring connection as in the Hood patent forms an important part of this combination. Basically, the use of two springs results in forcing the sign frame to tip along the longitudinal axis of the elongated ground-engaging members. The claim has been amended to recite that there is at least a pair of spaced apart elongated ground-engaging members. For this reason, Claim 6 has been cancelled because it previously recited this subject matter. Claim 1 has also been amended to recite the spring strength and with respect to formal typographical errors in lines 10 and 12. The limitation has also been added to Claim 1 that when the frame structure is deflected, it is deflected in the direction of the longitudinal axis of the base.

The importance of the claimed combination resides primarily in the fact that the sign is forced to tip in the direction of the longitudinal axis of the elongated base members which may, therefore, be of light weight material. This results in the tipping force always being applied along

the longitudinal axis rather than sidewardly as might be the case in the Hood patent. Additionally, the device is so constructed that the weight of the sign frame will not cause tipping even when the sign is completely deflected so that the center of gravity thereof may be slightly beyond the ends of the base.

The statics involved in the claimed sign structure are illustrated in the attached Figure forming Exhibit A.

The Figure illustrates the forces and moment arms of the poster display device which would tend to tip the device about the base as a result of a wind or other force being applied thereto and as a result of gravity. The various notations are explained in connection with the Figure.

Referring to the Figure, the force of the wind is assumed to be concentrated at the geometric center of the face of the sign against which the wind is directed. The weight of the sign frame is concentrated at the center of gravity of the sign frame which substantially coincides with the geometric center of the sign frame. As will be noted in the Figure, initially Fw acts through a moment arm, Maw, about a point A tending to tip the sign. This tipping force is opposed by the weight of the sign frame, Wf, and the weight of the base, Wb, acting through a moment arm, Mag. Initially, Mag is the same for both Wf and Wb.

rejection, a relatively complicated modification of Hood. The actual basis for making such modifications would require a considerable amount of hindsight. Therefore, it is not seen that it would be obvious to make the changes required in order to convert the Hood structure into Appellants' structure.

It is further submitted that it would not be obvious to make such changes in view of the difference in the aims of Appellant and Hood. Hood has a small sign which is placed in a roadway to regulate vehicle traffic. His problem is basically that of having a sign knocked over as a result of being hit by an automobile. A car might hit the sign at any angle and therefore Hood wants his sign to be able to bend at any angle. He could not use an elongated base as Appellant has done in place of his heavy base because the elongated base of Appellant requires that leverage be used rather than weight to keep the sign in an upright position. The use of leverage requires that the direction of deflection of the sign supporting springs be constrained along the longitudinal axis of the elongated base. This would not permit tipping of the sign in any direction as desired by Hood. Therefore, Hood would not utilize Appellant's type of construction nor would Appellant utilize Hood's type of construction because in order to have a sign of the large type required by Appellant, it would be necessary to provide a very heavy base which is uneconomical and impractical.

One of the novel points of structure in the present invention is the provision of a pair of spring connections as opposed to a single spring connection as has been used in the past in connection with signs as represented by Hood. At first glance, it would appear obvious to provide two spring structures instead of one if this were desired. However, the aim of providing two spring structures is not simply to provide additional support for the sign frame or a modified type of support therefor. The reason for providing two spaced apart spring connections is to force the sign to deflect in a direction along the longitudinal axis of the base and to prevent

twisting of the sign frame. Thus, it is not a matter of choice whether one or two springs are used in Appellants' invention.

Claim 2 adds the additional limitation of the use of coil springs which is the preferred form of the invention. Claim 3, which depends from Claim 2, adds the limitation that the frame has a generally rectangular shape including a generally horizontal bottom member to which the springs are secured. This is a preferred embodiment of the invention.

Claim 7 recites the fact that the central portion of the ground-engaging members is raised a short distance above the ground level to provide a minimal lever action tending to tip the display device. The Examiner has correctly stated that this is also true in Hood. However, this is a preferred embodiment of the invention and is believed to be allowable along with the independent claim from which it depends. In this respect it should be noted that Claim 7 is indicated as being dependent from Claim 6, Claim 6 having been cancelled. The substance of Claim 6 was incorporated into Claim. Therefore, Claim 7 should be read as being dependent from Claim 1.

Claim 8 depends from Claim 7 and sets forth the ratio of the distance of the central portion above the ground level to one-half the length of the ground-engaging members as being approximately one to five. This is a preferred ratio and is not shown in the cited art.

CONCLUSION

Appellant is the first in this art to provide a sign structure having a large sign frame supported on an elongated base by means of a spring structure connected at least at two spaced apart locations between the lower portion of the frame and the base to thereby constrain tilting of the frame to a direction along the longitudinal axis of the base to thereby take advantage of the leverage offered by the elongated base. The recited structure in the claims differs in at least seven ways from that shown in Hood. It is submitted that it would not be obvious to modify Hood, in view of the different purpose of

the sign in the Hood Device, so extensively as to result in Appellant's structure.

It is submitted, therefor, that the final rejection herein should be withdrawn and that Claims 1-3, 7 and 8 should be allowed.

Respectfully submitted,

WHITTEMORE, HULBERT
& BELKNAP

By: /s/ Dale R. Small

EAC/id

April 6, 1970
Detroit, Michigan 48226

[COUNSEL] [FILED]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT SARKISIAN

Plaintiff,

v.

WINN-PROOF CORPORATION,
WILLIAM A. WERNER, and
WER-NEL ENTERPRISES, INC.,

Defendants.

Civil Action No. 75-1131

PLAINTIFF'S POST-TRIAL BRIEF

I. INTRODUCTION

This Post-Trial Brief will be confined in large part to summarizing and highlighting the pertinent evidence adduced at the trial as it bears on the various issues framed by the parties in their respective pre-trial memoranda. No new issues, not already analyzed and argued in the previous briefs submitted, were raised at the trial and, accordingly, rather than restating or otherwise repeating such material in this brief, in the interests of brevity, those portions of the earlier briefs which pertain to the evidence discussed below, and its significance, be indicated by cross-reference.

Plaintiff's Proposed Findings of Fact and Conclusions of Law, submitted concurrently with this Brief, set forth an

orderly and detailed presentation of the stipulated or otherwise uncontested factual material, together with a statement of the factual and legal issues and proposed rulings, involved in this patent infringement case, and the legal precedents and authorities applicable thereto. As requested by the Court, there is also being submitted, as an Appendix hereto, Plaintiff's written objections to the admission of several of defendants' exhibits.

The following abbreviations will be used in this Brief to and accompanying materials:

"PX" - Plaintiff's Exhibit

"DX" - Defendants' Exhibit

"PTO" - Pretrial Order

"Tr." - Trial Transcript.

"St." - Statement of Witness's Direct Testimony

"P Pre-Trial Memo" - Plaintiff's Pretrial Memorandum

"P Reply Memo" - Plaintiff's Pretrial Reply

II. THE INVENTION OF THE SARKISIAN PATENTS IN SUIT (P Pre-Trial Memo 3-8)

Plaintiff's expert witness, Townsend F. Beaman, and plaintiff himself both testified to the nature, characteristics and advantages of the unanchored*, readily portable "Windmaster" sign stands which embody the innovative subject matter of the '696 and '482 patents in suit. (Beaman St. 1-2; Sarkisian St. 2-6; Tr. 115-117, 214-215).

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* By "unanchored" is meant that no ground fastening or additional weight of any kind (i.e. sand bags, concrete blocks, etc.) is used to maintain the stability of the sign and prevent it from tipping, walking, sliding or twisting.

In addition, a movie (PX 72, PX 72A) was shown during plaintiff's opening statement which demonstrated, in rather convincing fashion, the stability and manner of operation of the "WindMaster" sign stands under mild to extremely high (70 miles per hour plus) wind conditions, in contrast to the unsatisfactory performance of a representative collection of conventional types of unanchored portable sign stands currently available. Beaman testified that the film sequences shown accurately represented the "dramatic" results of tests made under his personal supervision in which "WindMaster" and other types of portable unanchored stands were set up directly behind an airplane and exposed to its propeller wash (air stream) at increasing throttle adjustments calibrated to produce wind conditions on the sign stands ranging up to eighty miles per hour. (Beaman St. 3-4; Tr. 193-194, 219) Plaintiff's product manager, Robert S. Broff, who participated in the tests which Beaman supervised and in others of a similar nature, corroborated the accuracy of the performances of the various sign stands depicted in the film (Broff St. 5-7; Tr. 100-102). Also, the tests were set up and calibrated by an independent testing company, Detroit Testing Laboratory. The validity of such propeller air stream tests, as being indicative of sign stand performance under actual environmental conditions, and the results observed with "WindMaster" type stands, was further evidenced through their utilization by a sign stand manufacturing competitor of plaintiff, Allen-Morrison, Inc., at the time when it was first presented with an opportunity to prove out the wind-stable characteristics claimed by Sarkisian for such stands (Reams St. 5).

The invention of the patents in suit, that is, the "WindMaster" sign stand concept; utilizes no components in its structure and assembly which were not generally available prior to plaintiff's conception of his invention in 1967. For example, defendants' own technical expert, William P. Allen, readily conceded that it would have been possible to fabricate

or otherwise obtain all of the components, and therefore* to build, a "WindMaster" sign stand of the type disclosed in plaintiff's patents, as early as 1899, the date of the Webb patent, the latter being the oldest of the various and voluminous items of prior art sign stand constructions cited by defendants as bearing on the patentability of the Sarkisian invention (Tr. 426-427). However, Beaman in his testimony on cross-examination specifically noted that a pre-loaded closely-wound helical extension spring*, although known to the spring art, had found very little application prior to Sarkisian's development of the "WindMaster" sign stand (Tr. 147). He also found in his study of the spring art and the uses therein of an extension spring having an initial tension or pre-load, that the "WindMaster" concept uses such a spring in an "unusual manner" not found elsewhere in the art (Tr. 214-215). This testimony was not contradicted by defendants' expert Allen who, although he made reference to the general availability to the trade in 1967 of pre-loaded extension springs, could point to no specific instance in which such a type of spring had, without the use of auxiliary springs or other artifices, been used for the purposes and in the manner utilized by Sarkisian in his sign stands (Tr. 373-374; 418-422).

III. ADEQUACY OF THE PATENT DISCLOSURES

(P Pre-Trial Memo 6-8; P Reply Memo 7-8)

Beaman testified that he had no great difficulty in understanding the "WindMaster" sign stand concept, as embodied in the claims in suit (Beaman St. 4; Tr. 138). He stated that the disclosure of the Sarkisian patents was sufficient to teach one skilled in the art how to construct an

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* This is the type of spring used in the mounting of the "WindMaster" sign stand to impart to it sufficient rigidity to remain the sign upright and not oscillate under mild wind conditions, but allowing it to bend over and present a lower profile to the wind when the wind forces would otherwise be sufficient to tip over or move the sign stand.

unanchored, readily portable sign stand with a virtually weightless base which would not be displaced by high wind conditions (Tr. 140-141; 160-161). As regards the formula in claims 1 and 2 of the second, '482 patent, Beaman found the basis for its subject matter to be inherent in the textual material and drawings of the first, '696 patent, and that it added nothing, from a conceptual standpoint, not already derivable by inference from the teachings of Sarkisian's first patent in reference to analyzing the stability of the sign stand when deflected over to the horizonal position (Tr. 125-128). It is worth noting that defendants' expert did not dispute this point regarding the inherency of the formula in the disclosure of the first patent, but instead essentially adopted it (Allen St. 14, 20). The formula could be summarized in words to mean, in effect, that the sign stand would remain stable, when deflected, so long as the moments* resisting tipping were greater than those tending to cause tipping (Beaman to St. 1).

Subject matter which is inherent in an application is not a departure from the application and thus does not constitute "new matter". Binks Mfg. Co. v. Ransburg Electro Coating Corp., 281 F.2d 252, 2S7 (7th Cir. 1960); Technicon Instruments Corp. v. Coleman Instruments, Inc., 255 F.Supp. 630, 640-641 (N.D. Ill. 1966), aff'd, 385 F.2d 391 (7th Cir. 1967). Thus, all of the subject matter of the '482 patent, with the exception of that pertaining to Figure 7 (the non-asserted flat spring embodiment), is entitled to the September 11, 1967 filing date of the '696 application, 35 U.S.C. §120, Saf-Gard Products, Inc. v. Service Products, Inc., 370 F.Supp. 257, 271 (D. Ariz. 1974), aff'd, 532 F.2d 1266 (9th Cir. 1976), cert. denied, 429 U.S. 896 (1976), Holmes v. Thew Shovel Co., 305 F.Supp. 139, 145 (N.D. Ohio 1969).

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* A "moment" is a term, in the scientific field of statics, referring to the tendency of a body to rotate about an actual or assured pivot point, and it is equal to the product of a force times a distance perpendicular (at right angles) to the direction of the force, measured between the force and the pivot point (Tr. 380).

Although Allen had, apparently, great difficulty in understanding the formula, which he regarded to be nothing more than the statement of a scientific truth or axiom (Allen St. 17), he admitted that in his analysis he had not considered the formula's definitions to apply to the vertical length between the pertinent parameters of the sign stand when its upper portion was in the horizontal, deflected position (Allen St. 16; Tr. 389-390). He instead attempted to apply the terms of the formula to the sign stand when fully upright -- a condition in which its stability against tipping is of no concern (Tr. 383-384). Further, Allen conceded that a first-year engineering student could readily handle the analysis of the moments involved in evaluating the stability of sign stands of the "WindMaster" type (Tr. 380-381; 392-393). There was, accordingly, the suggestion throughout the course of his questioning on this particular point that he had not considered all realistic alternative interpretations in his attempt to apply the formula in a meaningful manner over a range of sign stand heights relative to the length of its supporting base legs (Tr. 379-392).

Allen, in his direct testimony, expressed no problem, however, despite the fact that no numerical information was provided on sign stand parameters, in understanding from his study of the Sarkisian patents how persons of ordinary skill in the art, "a normal person", could take the patent disclosure and construct the springs involved "in their shop" and then "build a sign stand that would function as they so desired, to bend in the wind, to not tip and so on" (Tr. 360-362). Beaman testified similarly on his cross-examination by defendants' counsel (Tr. 160-161; 178), so at least on this point, regarding the adequacy of the Sarkisian patent teachings, the experts were fully in accord.

IV. VALIDITY OF THE SARKISIAN PATENTS

(P Pre-Trial Memo 16-20; P Reply Memo 5-6)

The voluminous assortment of prior art items assembled by defendants, totalling some eighteen patents and excerpts from two works on spring design, and urged by them to collectively render obvious, within the meaning of 35 U.S.C. §103, the subject matter of the "WindMaster" inventive concept as embodied in the five patent claims in suit, has been dismissed, both summarily and elaborately, by the trial testimony and other evidence. In summary fashion, all of the various prior art sign stands alluded to by defendants, including those specifically referred to by Allen in his testimony (Allen St. 4-12; Tr. 358-360), were either anchored (i.e., fastened) to the ground or relied upon the weight of the base member to maintain their stability. Mr. Allen so testified at the trial as follows (Tr. 401-402):

"Q. (By Mr. Chernoff) Would you agree, Mr. Allen, that with regard to sign structures of the type shown in the patents, Sarkisian patents, in particular you might look at Figure 8.

"A. Yes.

"Q. That if the center of gravity of the sign frame structure when tipped over is within the perimeter of the base, I think you have testified, the unit is stable?

"A. That's correct.

"Q. It will not tip over. Under those conditions, when that occurs, isn't the weight of the base totally irrelevant for stability purposes?

"A. Yes

"Q. You said, "yes"?

"A. Yes.

"Q. That means the base could be as lightweight as possible, within the confines of necessary rigidity?

"A. That's correct.

"Q. Can you show me one device in the prior art patents which you have referred to in your narrative, in which the weight of the base is irrelevant to the stability of the device when tipped over?

"A. That is irrelevant?

"Q. Yes.

"A. That is not a consideration?

"Q. Yes.

"A. No, I'm sorry, I can't recall any that -- where the weight of the base is not a relevant item."

Beaman testified on recross-examination to similar effect with regard to the weight of the base of the Sarkisian stands being of no consequence when the sign is not extended to the upper position (Tr. 226-227).

On this one highly significant point, which for the first time made available to the industry a readily portable (that is, lightweight) sign stand not requiring fastenings or weights to hold it secure during high wind conditions, whether caused by natural weather conditions or gusting by passing high-speed trucks, the Sarkisian "Wind-Master" invention effectively and dramatically distinguished itself over the prior art, which Beaman defined for the Court as being "all that has come ahead of the invention" (Tr. 238). Werner himself, if any higher accolade be needed, in calling attention to this very same distinctive feature in defendants' trade literature promoting their sign stands (e.g. PX 3), referred to it as "amazing" and a technical "breakthrough" (Tr. 334-336).

Turning to a more elaborate dissection of the prior art advanced by defendants, which Beaman found to be no better than that considered by the Patent Office at the time the Sarkisian patents were examined and allowed (Tr. 226) ,

Beaman prepared a chart (PX 77; Tr. 219-226) which outlines five characteristic features of the Sarkisian "WindMaster" sign stand construction and summarizes his finding as to the presence and absence of such features in various prior art patents cited by defendants as well as in the accused sign stand construction of defendants. His accompanying testimony further explained and amplified these findings (Beaman St. 2-3; Tr. 141-179) which are to the effect, as indicated on the chart, that no single reference discloses or suggests more than two of these important features.

Not unexpectedly, the respective experts for two the parties sharply differed on the ultimate question of whether the subject matter of the "WindMaster" invention, as embodied in the claims in suit, would have been obvious to one who, in 1967, would have had ordinary skill in the sign stand art. However, as became apparent during his cross-examination, defendants' expert Allen was applying an erroneous and unfounded standard to determine whether the Sarkisian invention was to be considered obvious or not. Specifically, Allen, in response to the Court's inquiry, was of the view that the appropriate test to be performed on a device comprised of a number of elements, was whether each of the constituent elements involved were readily available in the marketplace (Tr. 373-374), in which case there could be no patentable invention arising from their assembly into the completed device, or, on the other hand, were not readily available and thus had to be fabricated specifically on a customized basis (Tr. 376-378), in which case the assembled device would necessarily embody patentable ingenuity (Tr. 449-430):

A. Well, Your Honor, to clarify it a little bit further, as I look at that sign stand that is described there, and as described by the art work here, I have great difficulty in looking "10 at that sign stand and seeing components that I could not purchase out of a store. As an example - - - - .

"Q. (By the Court) Does that fact, in and of itself, mean to you that you could not have an item that could be patented just because you could buy the items out of the store?

"A. Your Honor, I have great difficulty in answering your question, but it's one of the measurements that I would use, yes.

In viewing this, the frame structure of aluminum tubing is a purchased item; the Plexiglas or glass front is a purchased item; the springs are purchased from a spring manufacturer, could have been taken right off the shelf; the tubular legs are are just tubular members which have been formed a little bit; there is a bracket there; and the rest of it is nuts and bolts.

I have difficulty in accepting that as teaching us anything about something new in sign stands when I go out and purchase every item there and put it together, and I realize that may not fit within the patent law concepts that you deal with, but that would be my feeling."

The extended dissertation (Tr. 368-369; 431-434) which Allen provided on the merits of his own patent directed to an improved form of projection screen stand* served admirably to demonstrate the wholly unique and unfounded standard which defendants' technical expert applied in reaching the conclusion that the subject matter of the Sarkisian patents, when taken as a whole, would have been obvious. Quite simply, there just is no basis under well-established principles of patent law for the test standard employed by Allen in

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* A copy of Allen's patent No. 4,017,152, entitled "Portable Projection Screen" is attached in the Appendix hereto for the Court's reference.

differentiating obvious from non-obvious subject matter in an invention involving an assemblage of elements.

Rather than delve further into the false patentabilty standard applied by Allen, it would seem more beneficial instead to set forth the correct guidelines for determining invention under the statutory requirements of 35 U.S.C. §103 as enunciated in Graham v. John Deere Co., 383 U.S. 1, 15 L.Ed.2d 545, 86 S.Ct. 684 (1966), quoted in plaintiff's pretrial brief (P PreTrial Memo 18). In the instant case, as mentioned earlier in Section II of this Brief, the "WindMaster" sign stand assembly incorporates a new element, a unitary pre-loaded extension spring, not previously used in the sign stand art or, so far as could be determined, in any analogous art, for the purposes and in the fashion utilized by Sarkisian to maintain the upper portion of his stand upright under mild wind, or other eternal force conditions, and yet allow the sign portion to deflect under heavier wind conditions so as to prevent tipping, and then return quickly upright when the force is removed. Under such circumstances, where there is a new element present which is different in structure and function from that of the prior art references, no finding of "unusual or surprising results" is required to support patentability of the claimed invention. Austin v. Marco Dental Products, Inc., __F.2d__ (9th Cir. 1977)*. In the present case, there was considerable testimony as to the high degree of innovativeness involved in the Sarkisian "WindMaster" sign stand, among which the most impressive was that of plaintiff competitor at the time, Bernard Reams, which was to the effect that the "WindMaster" sign stand was considered by his company, the largest advertising display sign stand manufacturer in the country, to be "a completely innovative, unique development in the freestanding curb stand field which prevented the unit from turning over in high wind" (Reams St. 5). Ruben Melesio, another individual

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* The Austin decision, rendered September 12, 1977, has not yet been reported, although it is Counsel's understanding that it soon will be. At such time that it is reported, copies will be furnished.

quite knowledgeable about the limitations and disadvantages of construction sign stands available in the industry, was similarly impressed by the "WindMaster" concept, testifying that it was a "beautiful .... great idea" to utilize wind force itself to keep the sign from blowing down (Melesio St. 3-4). As previously stated, even defendant Werner referred to it, in an outburst of advertising hyperbole, as an "amazing" idea in reference to the wind stability of the unanchored lightweight sign stand. All in all, it is submitted that the testimonial evidence adduced amply supports a finding that, in the words of the Austin decision, more than just an improved product is involved; instead, the Sarkisian patents disclose an innovatively different product in the sign stand field.

Even if the "WindMaster" sign stand patents are considered to be merely so-called "combination patents", involving an assemblage of individual elements each of which is old in the art, as so contended by defendants (Tr. 33-34), the Sarkisian sign stands, in their manner of operation and particularly in their performance, clearly evidences the "unusual and surprising results", the "synergism" if you will, which the law requires to find the subject matter of the invention not to be obvious to one of ordinary skill in the art. Saf-Gard Products, Inc. v. Service Parts, Inc., 370 F.Supp. 257 (D. Ariz. 1974) aff'd, 532 F.2d 1266 (9th Cir. 1976), cert. denied, 429 U.S. 896 (1976).

Here the "WindMaster" sign stands, although unanchored, readily portable and capable of having a virtually weightless base, remain stable under high wind conditions -- a combination of features not found anywhere in the prior art and which all of the witnesses from both sides who were experienced in the sign stand field considered to be highly important in practical applications of advertising display and construction signs. Melesio and Reams both testified as to the long-felt need for such signs in their respective trades, and Allen saw no reason to question the feasibility of constructing such signs in accordance with the patented "WindMaster" concept before the turn of this century since, in his view, all

the components, tooling and materials were available even way back then.

The "surprising" aspect of the "WindMaster" invention in the sign stand field was vividly demonstrated at the trial by the action of defendants' counsel who, even though amply familiar with the sign stands which are the subject of this suit, and the Sarkisian patents which explain the "WindMaster" concept, nevertheless displayed his healthy skepticism of the ability of the stand to remain stable and not tip over on deflection, by bracing one of the base legs with his foot when he bent the sign over (Tr. 33-34).

The unobviousness of the Sarkisian invention is further shown by the wide-spread recognition and success that it has achieved in the marketplace. The "WindMaster" concept has won a number of awards and have been highly acclaimed by persons in the industry. Also, the "WindMaster" sign stands have achieve substantial commercial success.

Competitors of Sarkisian and Marketing Displays have recognized the value of Sarkisian's invention. Penn-Chem, Corp. entered into a royalty bearing agreement under the two patents in suit (PX 47). Two other companies who were making infringing sign stands, namely Thomas Displays and Sunset Manufacturing, were sued by Sarkisian for patent infringement and each entered into a Consent Judgment. Further, a large number of companies in the sign industry throughout the country, including many competitors of Marketing Displays, have become distributors or customers of the "WindMaster" sign stands. (See Plaintiff's Proposed Findings of Fact 50-52).

Merely because the elements of a claimed combination are old does not negate patentability and inventiveness since this would preclude patenting of virtually all new devices, Reeves Instrument Corp. v. Beckman Instruments, Inc., 444 F.2d 263, 270-271 (9th Cir. 1971). Indeed, a patent consisting of a combination of old elements, the key element being a leaf spring as held valid by the Ninth Circuit Court of Appeals in

Cool-Fin Electronics Corp. v. Int'l Electronic Research Corp., 491 F. 2d 660 (9th Cir. 1971).

V. INFRINGEMENT BY DEFENDANTS OF THE CLAIMS IN SUIT

(P Pre-Trial Memo 9-14; P Reply Memo 2-4)

Beaman testified that all the various models of accused sign stands marketed by defendants, when the signs are mounted on them, infringed all five of the claims in issue, claims 3, 4 and 5 of the '696 patent and claims 1 and 2 of the '482 patent (Beaman St. 3-4; Tr. 118, 186-188). The basis for this conclusion, as Beaman brought out upon his examination, was that defendants' accused sign stands, as represented by courtroom exhibits PX 67, 68 and DX 603, were slavish copies, from the standpoint of function, of the sign stand described and claimed in the Sarkisian patents (Tr. 181-182). The differences in design which he did recognize to exist were not significant from the standpoint of his infringement determination, since in each instance where the applicability of the claim language to the accused sign stand structure was questioned, Beaman found there to be a "full equivalent" present (Tr. 182-188, 215-216). Specifically, on the three points to which defendants directed their arguments based on the defense of non-infringement, Beaman responded on examination as follows:

(1) "A pair of spaced apart generally parallel elongated ground-engaging members"*

While the ground-engaging legs of the base member of the defendants current "second generation" sign stand, PX 68, were not "parallel" to each other in the strict sense of the word they were "generally parallel" in the sense that their respective leg members resided in parallel planes. As to defendants' obsole "first generation" sign stand, PX 67 and DX 603, the respective portions of the stand leg members that

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* This language appears only in claims 3-5 of the '696 patent.

were in engagement with the ground were parallel to each other (Tr. 182-186). With both accused sign stands, spaced-apart legs are used to stabilize the base of the stand and thus the results are very similar (Tr. 215-216).

(2) "A pair of spaced-apart coil springs"; "Spring means connected at two spaced-apart locations"

Defendants argued strenously that the term "spaced-apart", as used in the claims in reference to the spring structure, was not applicable to their current version of sign stand in which the two coil springs, formerly separated by a substantial clearance, had been moved inwardly toward each other so as to be in touching contact. Beaman pointed out that the purpose to be served by the pair of springs, as described in the patents, was to avoid canting and twisting of the sign stand and also to define a direction in which the sign stand would deflect. Those purposes would be served if a sign stand were provided with at least one pair of non-concentric springs, i.e., springs whose respective axes are spaced apart. Even Werner, on his cross-examination, conceded that the pair of touching springs which defendants utilize in their latest model sign stand (DX 592 operates in substantially the same manner as the earlier models when the springs were separated apart, although there may be more sideways motion flexibility present when the springs are touching (Tr. 340-342).

Beaman explained that the language regarding the spaced-apart mounting of the springs was inserted into the patent claims during their prosecution for the express purpose of distinguishing over stand devices, such as shown in the Hood pate which utilized a pair of concentrically mounted springs (Tr. 197-199; Sarkisian patent file wrapper, PX 49, pg. 27). There was nothing in the file histories of the patents in suit which would require that the claim language be narrowly defined so as to not include springs which were spaced apart (i.e., non-concentric but also touching, since the functions served would still be the same, and that would not

be the case with the concentrically mounted springs of the Hood device (Tr. 216-218).

On the other hand, Allen, who admittedly was not proficient in patent prosecution matters (Tr. 357-358, 402-403), had not even reviewed the file histories of the Sarkisian patents in preparation for his testimony (Allen St. 2; Tr. 402) and thus his testimony, as to the limited range of meaning to be given the term "spaced apart" in reference to the mounting of the spring means, is clearly both incompetant and uninformed. It is "fundamental" in patent law that the claims of a patent are to be construed in the light of the specification and drawings United States v. Adams, 383 U.S. 39, 49, 86 S.Ct. 708, 15 L.Ed.2d 26 572, 579 (1966), and that the history of the patent application before the Patent Office must be taken into account in construing the meaning and scope of the claims, Schriber-Schroth Co. v. Cleveland Trust Co., 311 U.S. 211, 61 S.Ct. 235, 85 L.Ed. 132 (1940). Further, when repeatedly pressed on cross-examination to come up with a broader or better term than "spaced apart" to distinguish over the Hood sign stand structure and yet also include within the scope of a claim both touching springs (adjacent) and non-touching springs (with a clearance between) whose respective axes were separated (i.e., non-concentric), Allen could not do so (Tr. 403-409).

(3) "An upstanding frame structure having a relatively large surface area for receiving display indicia...the surface area of the frame being of a size which normally causes displacement of the base upon application of a sufficient wind force there against"*

Defendants state that their accused sign stands do not, by themselves without a sign board mounted thereon, present any substantial surface area to be acted upon by wind forces. However, such a literal interpretation of the claim language,

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* Claim 2 of the '482 patent contains only the first portion of the quoted-phrase.

so as to focus, as noted by Beaman, upon only the sign stand structure its uncomplete state and apart from the form which it takes when fully assembled and used in its intended environment (Tr. 118 is an artificial and unwarranted restriction on the scope to be accorded the claims in light of the magnitude of Sarkisian's advangement over prior art sign stand designs. In light of Sarkisian's teaching of the "WindMaster" concept, which incidental was incorporated by plaintiff into a roadside construction sign stand having a single upright and it coil springs mounted close together in an arrangement markedly similar to defendants' models, a full six years beforehand (PX 55; Tr. 248-249), and the unique manner in which "WindMaster" sign stands with large display areas* function, though unanchored and readily portable, to be stable against tipping under high wind conditions -- a function fully incorporated in the accused devices of defendants - Beaman had no difficulty in interpreting the questioned phraseolog to apply to the completed sign stand wherein the sign itself forms a part of the frame in the completed installation (Tr. 186-188).

Although defendants now vigorously contest infringement based on differences in their sign stand constructions which have been shown to be picayune, it is quite significant, on the substantive merit of such non-infringement arguments, that three patent lawyers, on different occasions and on their initial consideration of the matter, advised defendant Werner that the Sarkisian patents were infringed by defendants' portable construction sign stands. First was Mr. Klarquist who so informed Mr. Werner of his views both by letter (PX 10) and orally at a meeting (Tr. 317); next was defendants' current patent counsel Mr. Stuart who, Werner testified, had expressed concurrance with

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* Beaman interpreted "relatively large surface area" to refer to a sign of such size that winds normally encountered would cause a problem with reference to tipping, blowing over or being destroyed when the sign stands were placed in use.

Klarquist's views (Tr. 323-324); and the last was Penn-Chem Corporation's Philadelphia patent attorneys, Paul & Paul (Tr. 286). Admittedly, each of these patent attorneys expressed reservations at the same time as to the validity of the Sarkisian patents; however, in none of the instances was such reservation founded on any substance, such as one or more items of prior art turned up in a validity search which was more pertinent than any considered by the Patent Office. Moreover, the reservation only applied to one claim of one of the patents; there is no evidence that any such reservation was made to any other claims of the '696 patent, or, more importantly, to any of the claims of the '482 patent. Thus, such reservations must be considered as being no more than visceral reactions of the attorneys involved, arising out of the wishful expectation that such better prior art existed, and having little practical effect. In that connection, Werner testified that Klarquist from the very first referred to the value of undertaking a validity search to uncover prior art which would provide the basis for an invalidity determination (Tr. 318, 320), but defendants did not act on this advice until long afterwards, when suit for infringement was brought by plaintiff (Tr. 317).

Since the accused devices contain substantially the same elements, perform in substantially the same manner, and achieve substantially the same results as the patented Sarkisian invention they are the equivalent of the Sarkisian invention and an infringement thereof, Graver Tank &, Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 608, 70 S.Ct. 854, 94 L.Ed. 1097 (1949). This equivalence was clearly demonstrated by the tests conducted by plaintiff before trial and depicted in the film (PX 72, 72A) shown at the trial, in which all of the accused devices performed in precisely the same manner as the patented "WindMaster" sign stands.

In a somewhat similar manner, the Court in Botsolas v. Schultz Laboratories, 351 F.Supp. 188, 191 (C.D. Cal. 1972), applied the doctrine of equivalents and found infringement. See also, Systematic Tool & Machine Co. v. Walter Kidde &

Co., 390 F.Supp. 178, 200-202 (E.D. Pa. 1975), and Olympic Fastening Systems, Inc. v. Textron, Inc., 504 F.2d 609 (6th Cir. 1974).

VI. WILFUL AND WANTON INFRINGEMENT

(P Pre-Trial Memo 14-16)

The defendants' flagrant disregard for plaintiff's patent rights, despite the advice of at least three patent attorneys that the defendants' products infringed the patents in suit, and without an informed opinion on invalidity, fully justifies a finding of wilful and wanton infringement. Saf-Gard Products, Inc. v. Service Parts, Inc., 370 F.Supp. 257, 273 (D. Ariz. 1974) aff'd, 532 F.2d 1266 (9th Cir. 1976), Rayonier, Inc. v. Georgia Pacific Corp., 156 U.S.P.Q. 110, 125 (abridged in 281 F. Supp. 17 687) (W.D. Wash. 1967)*. Indeed, Werner was informed of his infringement long before he began significant commercial manufacture of the accused devices, but he instead proceeded on the basis that it would probably take Sarkisian a few years to find out about him and he would attempt to get away with it for as long as he could.

Defendants' conduct also makes this an "exceptional cas" within the meaning of 35 U.S.C. §285, justifying an award of reasonable attorney fees to plaintiff. If the defendants had taken steps to change their product design, secure an informed validity opinion, or attempted to reasonably negotiate a settlement to this matter, the present trial might not have been necessary.

Furhter, the uncompromising and unreasonable position and attitude of defendants are evidenced by the unfounded positions taken by them on various issues in this case, such as Allen's view on patent validity, the various non-infringement

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* Copies of the unofficially reported cases that plaintiff is relying upon, i.e. those contained in the United States Patent Quarterly (USPQ), were submitted in booklet form to the Court during trial.

assetions, and the allegations of plaintiff's fraud and patent misuse. The defendants' actions throughout this case should not be condoned; instead, it is submitted, they should be made the basis for an award of increased damages and attorney fees to plaintiff.

VII. FALSE PATENT MARKING

(P Pretrial Memo 21-22)

Defendants admittedly included the term "patent pending" on labels and brochures long before a patent application was ever executed by Werner and filed in the Patent Office (PTO III,13) Werner also had secured patent and other legal advice from a number of attorneys and, despite his denials at the trial, knew the full meaning and significance of the term "patent pending". Werner's compulsive and aggressive policy to promote the sale of his "patented" products, as well as to license his "patent rights", substantiates his knowledge in various areas of patent law and his attempts to purposely mislead others. The testimony of Melesio, Lacy and O'Brien, who had direct contact with Werner, and the comments of Leach, Hensley and Sarkisian who attempted to clear up the misunderstandings created by Werner and the other defendants, overwhelmingly prove that the defendants engage in various acts of false patent making, in violation of 35 U.S.C. §292, and should be fined accordingly.

VIII. DEFENDANTS' OTHER DEFENSES

The defendants have also raised a number of other defense and contentions against Sarkisian, none of which have any substance, and none of which were proven in any regard at trial. In most instances, the complete paucity of evidence on these issues, as more clearly pointed out in plaintiff's proposed Findings of Fact, show that these issues were raised as a smokescreen by defendants in an attempt to

avoid a full and fair analysis on the basic issues in the case which are uniformly in plaintiff's favor.

For example, defendants' allegations of fraud on the Patent Office, patent misuse, invalidity of the patents under 35 U.S.C. §112, and unfair competition, simply provide no basis in law or in fact upon which findings can be made against plaintiff. The plaintiffs position on those issues, as well as the supporting law, is adequately set forth in Plaintiff's Pre-Trial Memorandum (pgs. 22-25), Pre-Trial Reply Memorandum (pgs. 10-12), proposed Findings of Fact (78-82, 84-86) and proposed Conclusions of Law (20-21) and does not have to be repeated here.

The only issue raised by defendants which deserves further mention, not due to its merit, but because it is a confusing and technical area of patent law, is their claim that the '482 patent is invalid for double patenting over the '696 patent. The proper statement of the law on this issue is cited in plaintiff's pretri reply brief (P Reply Memo, 7-9). The authority in this Circuit supports the view that the two patents in suit are not invalid for double patenting since: (a) the two patents are in the name of the same inventor; (b) the two patents terminate on the same date; (c) the applications upon which the two patents were based were co-pending in the Patent Office; and (d) the two patents are and remain commonly owned. Saf-Gard Products, Inc. v. Service Parts, Inc., 370 F.Supp. 257, 271 (D. Ariz. 1974), aff'd, 532 F.2d 1266 (9th Cir. 1976). Also, the Patent Office Examiner did not raise the issue of double patenting, even though he knew of the claimed scope of both co-pending applications, and the presumption of administrative correctness within the Patent Office is given much weight on this point, Pursche v. Atlas Scraper & Engineering Co., 300 F.2d 467, 481 (9th Cir. 1962), Southern Implement Mfg. Co. v. Mclenmore, 350 F.2d 244, 249 (5th Cir. 1965), and Uncas Mfg. Co. v. McGrath-Hamin, Inc., 265 F.Supp. 1008, 1012 (D.R.I. 1967).

The only case cited in Defendants' Reply Brief on the issue of double patenting was In Re Vogel, 422 F.2d 438

(C.C.P.A. 1970), for the proposition that 35 U.S.C. 101 does not allow the same invention to be claimed twice. By definition at the commencement of the opinion, however, the Court equated "same invention" with "identical subject matter", 422 F.2d at 441. The Court went on further to state that:

> "A good test, and probably the only objective test, 'same invention', is whether one of the claims could be literally infringed without literally infringing the other. If it could be, the claims do not define identically the same invention", supra at 441.

As a result, the Curt found that process claims reciting meat, pork, and beef did not recit the same invention twice. If the claims are not identical then the court in Vogel stated that the next step is to determine if the claims in question are merely "obvious variations" of the invention disclosed and claimed in the first patent. If the answer is affirmative, then a terminal disclaimer is required to save the validity of the second patent.

In the present case, it is clear that the claims of the '482 and '696 patents are not "identical". The witnesses both plaintiff and defendants at trial showed that some variation exist; it is possible to infringe the claims of one patent with out infringing the claims of the other since they all have different scope. The Patent Office further adjudged this to be the case when it issued the '482 patent. The question whether these variations are obvious does not arise due to the terminal is disclaimer. Accordingly, the '482 patent in suit is not invalid under the weight of authority either in the Ninth Circuit of the Court of Customs and Patent Appeals. See also In Re Thorington, 418 F.2d 528, 534 (C.C.P.A. 1969).

It is also interesting to note that the rationale of the principle case cited by defendants in their pre-trial memorandum, namely Sterling Varnish Co. v. Louis Allis Co., 149 F.Supp. 826 (E.D. Wisc. 1957), was neither cited nor followed by the Seventh Circuit in a later case, J.R. Clark Co. v. Jones & Laughlin Steel Co., 288 F.2d 270, 281 (7th Cir.

1961), cert. denied, 368 U.S. 828 (1961), where the plaintiff's present position as supplied by the Saf-Gard case, was the rule of decision.

IX. CONCLUSION

The relief sought by plaintiff in this action should be granted.

November 28, 1977

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of PLAINTIFF'S POST-TRIAL BRIEF AND PLAINTIFF'S FINDINGS OF FACT AND CONCLUSIONS OF LAW were hand delivered to defendants' attorneys Kolisch, Hartwell, Dickinson & Stuart, 1004 Standard Plaza, Portland, Oregon 97204, this 30th day of November, 1977.

/s/ Daniel P. Chernoff
Daniel P. Chernoff

PLAINTIFF'S OBJECTIONS TO DEFENDANTS' EXHIBITS

Plaintiff objects to the following trial exhibits of defendants:

DX605 Sarkisian deposition

DX606 Hensley deposition

DX607 Leach deposition

DX611 Letter: Ciamporcero to Werner dated 7/26/76 with attached proposed agreement

DX612 Letter: Ciamporcero to Werner, dated 8/6/76

A. DX605, 606 and 607

These three exhibits constitute transcripts of pretrial depositions of plaintiff's witnesses. All of the witnesses, however, were present at trial and cross-examined by defendants. Thus, the deposition transcripts are inadmissible at least as to the two non-party witnesses, Leach and Hensley, under the terms of Rule 32(a) of the Federal Rules of Civil Procedure. See also, G. E. J. Corp. v. Uranium Aire, Inc., 311 F. 2d 749, 755 (9th Cir. 1962).

As to the Sarkisian deposition, it is submitted that it is also inadmissible under the spirit of Rule 32(a), as well as being merely cumulative and irrelevant. The defendants had ample opportunity to question Sarkisian at trial concerning all relevant areas and they should not now be allowed to use his deposition to supplement that questioning and to go into areas irrelevant to the issues presented at trial.

B. DX611, 612

These are the so-called "impeachment" exhibits offered by defendants during direct examination of Werner apparently to impeach a statement made by O'Brien. In the O'Brien statement, he stated that he broke off license negotiations with respect to Werner's "patent rights" - evidently due to various misstatements, omissions and the like made by Werner during

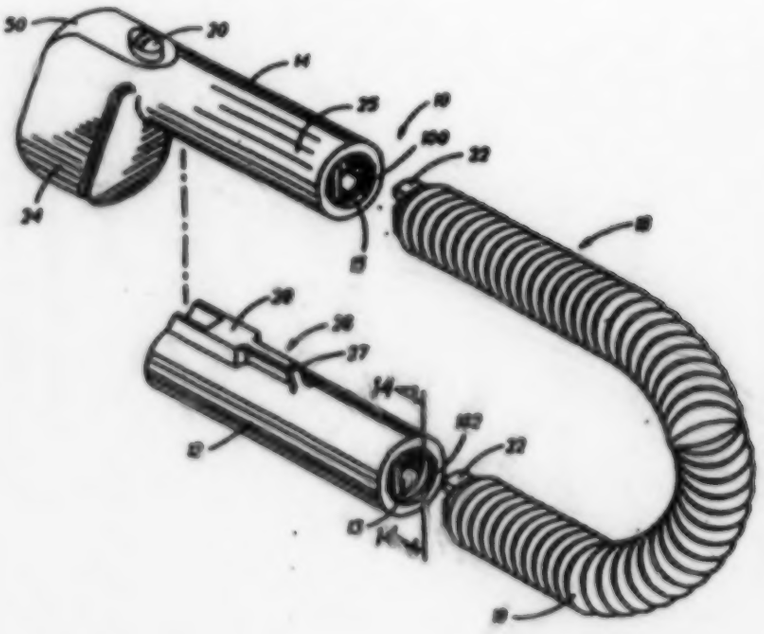
the negotiations - and, as a result, contacted Marketing Displays and Sarkisian and eventually reached an agreement with them. Frankly, it is mystifying why the exhibits were offered since they do not contradict that testimony, nor any other testimony of O'Brien.

The O'Brien "impeachment" exhibits should be excluded from this case for a number of reasons. First, it is important to point out that counsel for both parties, at the request of Judge Solomon, had a conference telephone call with O'Brien one week before trial in which O'Brien confirmed all of the information contained in his statement and after which the defendants' counsel stated that he did not want to add anything else to it (Tr. 287-290). Secondly, at trial, defendants' counsel stipulated without reservation, as to the contents of the O'Brien statement (Tr. 64-65). Later, when exhibits DX611 and DX612 were first disclosed at trial, and, for the first time seen by plaintiff's counsel, plaintiff's counsel, who believed that he earlier had reached an agreement with defendants' counsel as to the O'Brien statement, was shocked. As a result, this court reserved ruling on exhibits DX611 and DX612 and granted plaintiff the right to take O'Brien's deposition after trial (Tr. 287-290).

When the initial shock wore off, however, and the exhibits were reviewed in detail, it became clear that an additional deposition was not necessary. The documents simply do not contradict or impeach O'Brien's statement in any regard. Defendants' claim that it contradicts O'Brien's statement that he "immediately" broke off negotiations with Werner after their second meeting, but O'Brien never said "immediately"-only that he thereafter terminated discussions with Werner (O'Brien St. 2-3).

Accordingly, defendants' exhibits DX611 and 612 should not be admitted into evidence because they (1) are not proper impeachment exhibits, (2) are irrelevant to any of the issues in this case, (3) violate the agreement reached between counsel prior to trial, and (4) are contrary to defendants' stipulation at trial as to the contents of O'Brien's testimony.

FIG. 1



1254

EXHIBIT W

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.

Plaintiff,

v.

TRAFFIX DEVICES, INC.

Defendant.

Honorable Paul V. Gladola

Civil Action No. 95-CV-40230

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Attorneys for Defendant

DECLARATION OF JACK KULP IN OPPOSITION TO MDI'S MOTION FOR SUMMARY JUDGMENT THAT DEFENDANT'S DUAL SPRING MOUNTED SIGN STANDS INFRINGE MDI'S TRADE DRESS

Jack Kulp, being duly sworn states:

1. I am President and founder of Defendant, TrafFix Devices, Inc. and make this Declaration in opposition to MDI's Motion for Summary Judgment That Defendant's Dual Spring Mounted Sign Stands Infringe MDI's Trade Dress.

2. Prior to founding TrafFix in October of 1986, I was President of the Signal Division of Royal Industries which was acquired by Lear Siegler, Inc., (LSI-Signal) in the spring of 1975.

3. During the last four to five years that I worked for LSI-Signal (1981-1986), the company became a distributor of MDI's WINDMASTER sign stands. MDI provided some advertising literature and distributor information to LSI-Signal in the early years as a distributor. In addition to distributing this literature and sales information to potential customers, LSI-Signal utilized it as factual guidelines to prepare its own advertising literature for MDI's WINDMASTER sign stand.

4. When LSI-Signal prepared advertisements and promotional materials for the WINDMASTER sign stands, all such advertisements and materials were based upon model literature and data previously provided by MDI and were approved by MDI prior to distribution by LSI-Signal.

5. Recently, while I was cleaning out my garage, I located some promotional materials that had been developed by, or in conjunction with, MDI during the time that I was employed by LSI-Signal. All of this material is still in the original form developed by MDI and LSI-Signal. This material was used in promoting the WINDMASTER sign

stands during the early to mid 1980's. Some excerpts of this material are attached hereto as Exhibits 1-2.

6. While working with MDI as a distributor of the WINDMASTER sign stand, I became knowledgeable that the functional configuration of the dual spring sign stand was protected by United States utility patents. During my employment with LSI-Signal and since that time, I have reviewed MDI's United States Patent Numbers 3,646,696 and 3,662,482, on several occasions.

7. During my employment with LSI-Signal, I became aware that both the '696 and '482 patent were successfully asserted against several sign stand manufacturers, including Winn-Proof Corp., the manufacturer of a sign stand having a closely spaced dual spring dual configuration.

8. Through my many years of dealings with patents and patent attorneys, I became aware that upon expiration of a patent, the invention covered by that patent becomes part of the public domain.

9. When I decided to make a wind resistant sign stand, I was aware that both the '696 and '482 patents had previously expired.

10. When developing my wind resistant sign stand, I believed that I had a legal right to utilize any of the functional designs covered by the expired MDI patents. It was my belief then, and is now, that the dual spring design of the MDI WINDMASTER sign stand became a part of the public domain upon expiration of MDI's utility patents.

11. It has NEVER been my intention to trade upon any goodwill or secondary meaning that may be associated with the WINDMASTER name or type of sign stand. Rather, I have always believed that I was adapting to my design some of the WINDMASTER functional features that are the subject of expired utility patents.

12. Although I referred to the TrafFix dual spring sign stand as the new steelmaster in internal communications only,

this reference occurred long before we had decided on a name for our dual spring sign stand, which was subsequently named the WINDBUSTER.

13. The sign stand that was ultimately developed and sold by TrafFix was not nearly identical to the MDI stand. One of the most significant differences is the unique TrafFix STEP-N-DROP® leg design which was developed by TrafFix Devices prior to the introduction of its WINDBUSTER sign stand. This unique design eliminated the need to bend over and release each leg individually by utilizing the old in the art, pull pin design of MDI and others. The United States Patent and Trademark Office on March 18, 1997 agreed that this leg deployment design was unique and granted TrafFix Devices United States patent number 5,611,509, which will expire 20 years from its application date of November 22, 1994 or November 22, 2014.

14. In an effort to further differentiate the TrafFix dual spring sign stand design from MDI and others, we developed a new spring loaded roll up sign holding bracket, as well as a new rigid sign holding bracket, which incorporates similar patentable features in both brackets. On August 5, 1996, the Patent and Trademark Office notified TrafFix that the utility patent application for the rigid and roll up signs brackets, with 39 clams, was allowed and will issue shortly.

15. The TrafFix Devices company name appears on each and every dual spring sign stand manufactured and distributed by TrafFix Devices, Inc.

16. I have been told the MDI has argued that TrafFix's small "traffix stand" is an equivalent to the WINDBUSTER dual spring sign stands. This is just not true. The TrafFix stand is designed to utilize only roll up signs and cannot, without modifications or adaptation, mount or support any size of rigid sign, let alone a 48"x48" rigid sign. The TrafFix sign stand itself is not wind resistant. Any wind resistant capability comes from the roll up sign frame which bends and

flex's in the wind when used in concert with the non wind resistant TrafFix sign stand.

17. Attached as Exhibit 3 is a declaration I previously submitted in this matter. I have reviewed that declaration and believe that all statements set forth therein are true.

/s/ Jack Kulp
Jack Kulp

Date: March 28, 1997

WINDMASTER

WindMaster vs Sign-Up Flex Mast Power Cell

SAFETY

All WindMaster signstands are designed with safety in mind. Pivot points (spring mounting locations) are always below bumper height of even sub-compact cars. And all elements of the system are mechanically locked together in such a way that they stay together when struck by a full size vehicle at any legal speed.

Sign-Up's Flex Mast Power Cell, on the other hand, takes the opposite approach. The pivot point is above typical car bumper height, and the upright (a separate piece) is a simple slip fit--no positive lock of any kind. This creates a situation where the upright and sign can become lethal projectiles in the event of an impact. In our testing of the Flex Mast, the sign separated and went through the windshield and the upright flew nearly a hundred feet. Sign-Up also promotes the fact that they sell extensions which allow the user to raise the pivot point even higher with more loose pieces, creating a greater danger.

WORKER SATISFACTION

All research indicates that a worker's proclivity for using discretionary equipment is inversely related to the degree of difficulty of use of that equipment. The easier to use, the greater the probability that it will be used. And, temporary warning signs need to be used.

WindMaster weighs less, sets up faster, and comes down easier than any other signstand on the market, including the Flex Mast Power Cell.

The best way to demonstrate the truth in this statement is to conduct a simultaneous, side-by-side set-up and take-down using WindMaster and Flex Mast. Take particular note of

what's involved in folding up the last leg on a Flex Mast unit. It is a difficult task.

COST EFFECTIVENESS

The fact that WindMaster offers the only four year signstand guarantee in the industry says a lot. The reason we can offer such a warranty says even more. No one else takes the pains we do in designing, testing and building signstands.

Compared to Flex Mast, WindMasters are made of 6061-T6 alloy aluminum instead of painted steel (all steel parts on WindMasters are electrostatically coated for corrosion resistance). WindMasters use two custom designed coil springs as opposed to a single die spring on the Flex Mast Power Cell. WindMasters save gas (due to lighter weight), labor (due to easier, quicker use), and direct cost because they last longer.

WindMaster is the original, and still the best by far. We outsell all of our competitors combined by a three to one margin. If you compare, you'll see there is no comparison.

a product of marketing displays, inc., 24450 Indoplex Circle, P.O. Box 576, Farmington Hills, MI 48018

October 16, 1995

Mr. John A. Artz, Esq.
Brooks & Kushman P.C.
1000 Town Center, Twenty-Second Floor
Southfield, MI 48075

Re: MDI-Traffix Devices
Your file: MDI 0455 A
Our file: L-1095

Dear Mr. Artz:

We are in receipt of your letter of August 28, 1995, but continue to disagree with your conclusions regarding the likelihood of confusion in the marketplace between MDI's marketing and sale of its WINDMASTER sign stands and TrafFix Devices' marketing and sale of its WINDBUSTER sign stands.

As you well know, the relevant market for sign stands of the type marketed by our respective clients is quite small and specialized. It is by no means comparable to a mass consumer market, wherein the product differentiation skills possessed by the consumers in that market are very minimal and confusion is likely. In the traffic sign stand market, the consumers are buyers of traffic safety equipment, who are quite aware of the relatively small number of suppliers in the market and who usually purchase by contract, often using a competitive bidding procedure, wherein there is direct contact between the buyer and the supplier or his representative. The typical buyer in the relevant market does not purchase "casually", but rather upon careful consideration of the relative merits and pricing of each product, as well as the reputation of the supplier and the outlook for a long and successful relationship with that supplier. Despite your anecdotal account of an example where one city buyer may have been momentarily confused, the two marks are not

similar in appearance nor in meaning, as explained in our previous letter, and buyers in the construction sign market should be able to easily differentiate, without confusion, between the two marks and their associated products.

For this reason, of primary importance in the construction equipment market is the reputation of the supplier in the marketplace and the quality and price of the product he sells. The policy of TrafFix Devices is to develop and cultivate relationships with customers by promoting its own good and well established name in the marketplace, and certainly not by trading off of the name of a competitor such as MDI. This is why TrafFix Devices always associates the WINDBUSTER mark with at least one of its registered house marks, as we explained in our previous letter.

While we strongly believe in the correctness of our position, we are also desirous of avoiding the expense and waste of protracted litigation, if possible. Accordingly, we are notifying you of the pending federal registration of the WINDBUSTER mark, for which a Notice of Allowance has been received and the Statement of Use subsequently filed. We are somewhat surprised that, given your strong objections to the mark, you did not avail yourself of the opportunity to file an opposition when it was published in March of this year, but we are nonetheless willing to stipulate to the filing by you of a petition to cancel, wherein it is agreed that should MDI prevail, TrafFix will not appeal the Patent & Trademark Office determination and will phase out its use of the mark, and, should TrafFix prevail, MDI will not appeal the Patent & Trademark Office determination, nor bring suit for trademark infringement, and will permit TrafFix Devices to use the mark without interference.

In addition to the above, our client is willing to stipulate to the prominent association of one of its registered house marks with the WINDBUSTER mark in all instances of use in connection with the products, as well as in its marketing materials, in the manner evidenced by the sign stand labels and sales brochures provided to you with our previous letter.

This has been done to date, evidencing our client's commitment to developing and maintaining its own goodwill in the marketplace, rather than trading on the goodwill of another, but are willing to stipulate to doing so on a continuing basis. Also, we would be willing to stipulate to discontinuing the use of the WINDBUSTER mark in the form to which you raised particular objections, namely wherein the two words are run together with two capital letters, once our client's present supply of marketing materials has been exhausted.

Regarding the trade dress issue, TrafFix Devices continues to believe that there is no merit in MDI's position. As we pointed out in our previous letter, the sign stands marketed under the WINDMASTER mark are constructed primarily of unpainted aluminum, whereas the signs marketed under WINDBUSTER mark are all steel sign stands painted in standard construction zone colors of orange and black. Therefore, the overall appearance of the WINDBUSTER sign stands is distinctly different than that of the WINDMASTER sign stands, so that there should be no likelihood of confusion as to source in the marketplace. Your statement that the different materials and colors of the TrafFix products "is not significant" in not understood, since they create a distinctly different appearance, and the color scheme of a product is often of key importance when trade dress is an issue.

With respect to the product configuration position you espouse; i.e. that MDI has secured a secondary meaning in the marketplace for a portable sign stand having an upright connected to a pair of closely spaced coil springs positioned on a narrow base with angled legs extending therefrom , this appears to be an unjustified attempt to monopolize the market by extending now-expired patent coverage on this particular configuration. The configuration at issue is entirely functional and utilitarian, and therefore is not protectible under trade dress laws, even if secondary meaning is proven (and you have not supplied any evidence at all of secondary meaning). The two coil spring configuration is required to accomplish

the function TrafFix Devices desires for its sign stands, and MDI may not force the use of an inferior or more costly configuration absent enforceable patent protection. Furthermore, given our client's diligence in labeling the product to indicate TrafFix Devices as the source, and the products' different appearance because of the different colors and materials employed, it is highly unlikely that the employment of the two coil spring configuration would cause any confusion in the marketplace, in any event.

We trust that the foregoing is satisfactory to your client and that we may quickly put this matter to rest.

Very truly yours,

/s/ Donald E. Stout

Donald E. Stout

DES:dec

cc: Mr. Jack Kulp
President
TrafFix Devices, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff(s),

-vs-

TRAFFIX DEVICES, INC.,

Defendant(s).

Case No: 95-CV-40230

EXPERT DEPOSITION

DEPONENT:	DAVID HILLSTROM
DATE:	Thursday, February 20, 1997
TIME:	9:45 a.m.
LOCATION:	1000 Town Center, 22nd Floor Southfield, Michigan
REPORTER:	Angela E. Probst, CSR-4679

Q. So presently --

A. I do not have any managerial responsibilities.

Q. And you are smiling. So, presently, do research, development and design activities occupy your full-time--

A. Yes, they do.

Q. In your capacity as an individual in research and development for MDI, do you have much customer contact?

A. Some.

Q. Would you define what you mean by "some"?

A. I see customers when it is needed to see customers. When I'm developing the products, we have --often visit customers to show them new products and talk to them to get a feeling about whether we are on the right track or not.

Q. Have you done that --

A. It might fit into the category of marketing.

Q. Have you done that with respect to any sign stands since you have been back at MDI since 1984?

A. Yes, I have.

Q. What sign stands would those be?

A. We have some brand new ones that were --

that are really privileged information.

Q. Those probably aren't going to be pertinent, but we'll follow up on those on a separate record.

A. Okay.

Q. How about any of the ones that you presently have out?

A. Back when we -- are you talking about had back when we first designed them or -- well, since 19 -- no. The answer would be no since 1984.

MS. MARSHALL: John, I believe the last exhibit at Mr. Hillstrom's previous deposition was 11. Do you agree with that?

MR. ARTZ: Yes.

MS. MARSHALL: If you have no objection, I'll start with Exhibit 12 --

MR. ARTZ: All right.

MS. MARSHALL: -- for this deposition.

(Deposition Exhibit No. 12 marked for identification.)

Q. Mr. Hillstrom, I'm going to show you a document that has been marked as Hillstrom Exhibit 12, and ask that you review that document, please.

MS. MARSHALL: I have a copy for your

* * * * *

[Pages 12-25 omitted]

A. I would say Sign-Up's unit is probably as durable as ours.

Q. Well, what about these 80 mile an hour winds? Do you know if a Sign-Up stand could withstand --

A. It probably could not.

Q. What about ease of setup and take down? Is that about the same?

A. It is about the same.

Q. What about capabilities of supporting, say a large 48 inch rigid sign? Would that be about the same as a Windmaster?

A. It would be approximately the same capability. Without looking at the dimensions of the base and being very specific, it would be hard to make a real accurate judgment, but just generally speaking.

Q. Why is it necessary to look at the dimensions of the base?

A. Because the stability of each unit would depend on the size of the base in relationship to the size of the sign that is being put on that base.

Q. Would the legs have anything to do with that?

A. Yes, of course. The dimensions of a

* * * * *

[Pages 27-29 omitted]

Considering all the factors that you listed as far as durability, is the Eastern Metal flat spring design as durable as the MDI Windmaster design?

A. Sure, it is as durable.

Q. Assuming that it has a good paint job?

A. Assuming that it has a good paint job or equal -- an equal quality coating.

Q. Do you know if it has the interchangeability of parts in the field? Is that something that you can do with the Eastern Metal's flat spring?

A. Well, it may be more difficult to change those parts than MDI's parts.

Q. Is that something -- you believe that it is more difficult?

A. Yes, I think so.

Q. Could the Eastern Metal's flat spring withstand wind forces of -- or wind speeds of 75 to 80 miles an hour?

A. I believe so.

Q. What about the Eastern Metal's dual spring design? Is that as durable as the MDI design?

A. Yes, it is.

Q. And does the Eastern Metal dual spring

* * * * *

[Pages 31-33 omitted]

MR. ARTZ: Let her finish the question. You started to answer before she finished.

THE WITNESS: I didn't know I did that.

MS. MARSHALL: I do it all the time.

Q. What about stability and the ability to adapt on uneven terrain? Is the Sign-Up Corporation sign stand equivalent to the MDI Windmaster and Steelmaster sign stands?

A. Approximately equivalent, yes.

Q. How does the Sign-Up sign stand adapt to uneven terrain?

A. It has detents positions in the base to allow the legs to be adjusted into uneven terrain positions.

Q. What about the Eastern Metal flat spring design? Does that adjust as well on uneven terrain?

A. I believe it does.

Q. What about the Dicke Tool horizontal spring design, is that something that can have parts easily interchanged in the field?

A. With reference to the springs, if they had

to be changed, I haven't examined it that closely that I can make a judgment.

Q. What about with regard to other aspects?

A. The legs and the upright can be changed approximately as easily as the Windmaster.

Q. Is there something about the horizontal spring that might make it more difficult or --

A. I really don't know. There could be some things, but I don't know. I haven't studied it closely.

Q. Did you attempt to remove the horizontal spring?

A. No, I didn't.

Q. What about the Dicke Tool sign stand with the horizontal spring; could that withstand gusts of 75 -- or strike that.

Could the Dicke Tool sign stand with the horizontal spring withstand 75 to 80 mile an hour winds?

A. Yes, it could.

Q. Could it do so to the same degree as the MDI Windmaster and Steelmaster?

A. Yes, it could.

Q. Is the Dicke Tool design a more complex design than the MDI Windmaster design?

MR. ARTZ: What do you mean by --

A. It is a question of -- complexity is a broad question, I guess. I would say they would be approximately equal in complexity.

Q. Does the Dicke Tool have more parts than the Windmaster design?

A. I think they would be approximately the same number of parts. There may be a few additional parts in the Dicke Tool.

Q. There may be a few additional in the Dicke Tool?

A. Right.

Q. Do you know the cost of manufacture of the Dicke Tool design versus the Windmaster design.

A. I don't know the cost.

Q. Now this all started with the last sentence of paragraph one of Hillstrom Exhibit 12, and in that sentence you also state that there are some hypothetical alternatives. Can you tell me what those are?

A. Sign stands can be made many different ways.

Q. Were you considering any specific ways when you reviewed that statement?

A. Yes. Two uprights could be used rather

than one, and has been done.

Q. Who has that been done by?

A. Excuse me, I meant to say a frame could be made with two uprights.

Q. Is that something that MDI did prior to going to the single upright?

A. If you remember the description I gave you of the first generation of MDI products, they were essentially two uprights.

Q. Okay. I have those exhibits. I have those exhibits with me; now I just have to see if I can pull out the right one.

Mr. Hillstrom, I'm going to show you a document that was previously marked as Hillstrom Exhibit Number 5, and ask you, is that the --

A. Yes, that is the one I was referring to.

Q. Okay. Thank you. Were you thinking of any other hypothetical alternatives when you agreed to the statement in the last sentence of paragraph one on page 2 of Hillstrom 12?

A. Yes, I was thinking about two vertical support members that were more closely spaced apart, but not right together, that could be used to support the sign stand and the spring and base assembly.

Q. Would that design that you were thinking of

still have two springs?

A. Yes.

Q. Would it still have a fairly narrow base?

A. Yes.

Q. Would it still have four skewed legs?

A. Yes.

Q. So is it fair to say that the design that you were contemplating was like the Windmaster design, with the exception that it had an additional upright?

A. Yes.

Q. Would the addition of another upright add more material to the sign stand?

A. Yes.

Q. At least to the extent that there was additional material, all else being equal, the sign stand would be more expensive to make?

A. Yes.

Q. Were you thinking of any other hypothetical alternatives with respect to that statement in paragraph one?

MR. ARTZ: Specific ones or general? Because he already answered in general.

MS. MARSHALL: I'm asking him what alternatives -- strike that. I'm asking him what

hypothetical alternatives he considered to be available as stated in paragraph one.

Q. Were there any others that you specifically --

A. I was thinking also of a welded frame arrangement where there would be a frame used as an upright rather than a single column.

Q. Would all else be the same in that embodiment?

A. Well, the springs would be a little further apart, and the legs would be -- and base would be slightly wider, but it would be still a design that would be a hypothetical alternative to what we are doing.

Q. Is that something that would also add more material?

A. It could add more material.

Q. So the extent that it added more material, it would be more costly, if everything else were the same?

A. It could be a little more costly.

Q. Okay. Any other hypothetical alternatives?

A. Those were the two that I had been thinking about.

Q. Okay. Let's talk about the Korman Sign for

a moment. You refer to a Korman Sign on the bottom of page 2 of Hillstrom 12. Which specific sign are you referring to?

A. Korman has a sign with a weird spring arrangement at the bottom that is different from anybody else's spring arrangement, is the best I can describe it.

Q. Is it sort of the 45 degree angle spring arrangement?

A. Let's see. It is either that or Services & Materials, and I can't remember which one is which. Yeah, it has the -- it has, yeah, it is -- I believe it is the 45 degree. No, they -- it has those extension springs on the bottom of it.

Q. Is that Korman model that you were referring to as durable as the Windmaster sign stand?

A. Again, I haven't really examined it for durability, but I would think it would be approximately as durable.

Q. Do you know if it would be as durable?

A. It is very difficult to answer that question. I haven't tested it for durability.

Q. What material is the Korman sign stand made out of?

A. Steel.

Q. So if you were comparing it with respect to the Steelmaster sign stand, would it be about as durable? Still hard to answer?

A. Again, the question -- I haven't thought about its durability. It is approximately the same.

Q. Okay. What about the stability on uneven terrain? Do you know how that compares to the Windmaster and Steelmaster products?

A. It has a leg adjustment for uneven terrain, but the stability has to do with the size of the base and the degree that they adjust, and I haven't actually looked at it carefully to be able to determine if it is equal or not.

Q. Okay. Anything that would give you an indication that it was or was not, just based on the design?

A. Nothing pops to my mind.

Q. What about wind performance? Could the Korman sign stand that you are referring to withstand 75 to 80 mile an hour winds?

A. No, I don't think so.

Q. What about repair in the field? Is that something that would be as easy to do with the Korman sign stand as with the Windmaster and the Steelmaster sign stands?

A. Again, there are many different designs. It is hard to remember the exact construction of each one in terms of its ability to be unbolted, and I didn't look at it with that necessarily in mind when I looked at it, so I can't really truthfully answer that question.

Q. Do you know if that is something that Korman offers, a spare parts list?

A. I don't recall. I think they do have a spare parts list.

Q. Okay. What about the Service & Material sign stand that you are referring to? Is that sign stand as durable as the Windmaster and Steelmaster products?

A. Again, the question of durability involves many issues. Again, I would say it is approximately as durable.

Q. If I took better notes, I could tell you what all those factors were, but what about repair in the field? Is the Service & Material sign stand something that can be as easily repaired in the field as a Windmaster or Steelmaster product?

A. Again, the -- I didn't study it to see if that was doable, but I believe that the legs and the upright are replaceable in the field of that unit.

Q. Does the Service & Material design have springs?

A. Yes.

Q. Are those something that can be replaced in the field as well?

A. I believe they can, but I'm not sure. I can't recall.

Q. Is the Service & Material the 45 degree angle spring design, or is it a different design?

A. It is a different design.

Q. And what design is the Service & Material design?

A. I'm having trouble recalling. I need to review a little bit to remember that one.

Q. Okay. Finally, I don't think we talked about Work Area Protection. Is that a sign stand that is as durable as the Windmaster and Steelmaster sign stands?

A. Again, it is a steel unit that--the protection of the paint on there, if we are talking about that durability, is one factor. If we are talking about its ability to be durable because it is strong enough and would withstand the wind forces, is another factor. But I believe it is approximately as durable as out units are.

Q. Do you know--

A. In particular, the Steelmaster, because we're talking about a steel product versus steel product.

Q. And any steel product would be a little less durable than an aluminum product?

A. No. No.

Q. Not necessarily?

A No.

Q. Does that depend on the finish?

A. It depends on what durability we are talking about; if we are talking about the durability of the finish or if we are talking about the strength durability, if you will, the ability of -- the durability of the stand to withstand abuse in the field and wind pressures. There are three different measures of durability right there.

Q. Well, with respect to materials, is it fair to say that aluminum is going to be more durable than steel?

A. If we are talking only about the ability of that material to resist, that durability quality of corrosion or deterioration of the product; not physical abuse.

Q. Are they the same as far as physical abuse,

or is one better than the other?

A. If we are talking about physical abuse, they are approximately equal.

Q. Okay. As far as corrosion, aluminum will be better than steel?

A. That is true.

Q. Okay. I may have asked you this, and if I did, I'm sorry. Can the Korman sign stand withstand wind velocities of 75 to 80 miles an hour?

A. I don't think so.

Q. Okay. What about the Services & Materials sign stand? It would be the same question.

A. I don't think so.

Q. Do any of the sign stands that you have enumerated, the Dicke Tool, Sign-Up, Services & Material, Korman Signs, Work Area Protection, or the Eastern Metal flat spring, have the same ability to withstand twisting as the MDI Steelmaster and Windmaster sign stands?

A. Yes, they do.

Q. All of them or some of them?

A. Well, there is a certain degree of twisting in each of them that is reasonable, from my opinion. I think they all would -- can withstand -- in each of them there is a method that was used to prevent

* * * * *

[Pages 46-72 omitted]

necessarily -- you are assuming something that is not in evidence, because you have had testimony here from a lot of people that --

MS. MARSHALL: Counsel, I'm not asking you to testify. Make your objection, we'll note it, and the witness can answer the question.

MR. ARTZ: I did. Objection.

MS. MARSHALL: Can you read back the question, please?

(Record repeated)

MR. ARTZ: Objection. You haven't set any type of standard or basis for that being the only basis for the rejection or acceptance of others.

MS. MARSHALL: Your objection is noted.

Q. Are you aware of that?

A. I'm aware that bids can be lost over monetary differences, small monetary differences.

Q. And what do you consider small monetary differences?

A. Cents

Q. Okay. We talked earlier about some various sign stands that were available on the market, and are those the sign stands that you were referring to at the -- in the sentence at the bottom of page 6 and

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

-vs-

TRAFFIX DEVICES, INC.,

Defendant.

Case No: 95-CV-40230
Hon. Paul V. Gadola

DEPONENT:	DAVID U. HILLSTROM
DATE:	Monday, September 23, 1996
TIME:	10:00 a.m.
LOCATION:	1000 Town Center Southfield, Michigan
REPORTER:	Pamela D. Cameron, CSR/5097

APPEARANCES:

BROOKS & KUSHMAN, PC
By: Mr. John A. Artz
By: Mr. John S. Artz
1000 Town Center
22nd Floor
Southfield, Michigan 48975-1351
(810) 358-4400

Appearing on behalf of the Plaintiff.

REISING, ETHINGTON, BARNARD & PERRY
By: Ms. Jeanne-Marie Marshall
By: Mr. Richard W. Hoffmann
201 W. Big Beaver
Suite 400
Troy, Michigan 48099-4390
(810) 689-3500

Appearing on behalf of the Defendant.

ALSO PRESENT:
LISA SARKISIAN - IN-HOUSE COUNSEL

I N D E X

WITNESS .....PAGE

DAVID U. HILLSTROM

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Southfield, Michigan
September 23, 1996
10:00 a.m.

D A V I D H I L L S T R O M ,

was thereupon called as a witness herein, and after having first been duly sworn to tell the truth, was examined and testified as follows:

MS. MARSHALL: For the record, Mr. Artz, what categories of the 30 (b) (6) deposition Notice is Mr. Hillstrom being produced to testify regarding?

MR. ARTZ: Categories twelve, thirteen and fifteen.

MS. MARSHALL: Will there be anyone produced with respect to category fourteen?

MR. ARTZ: No.

MS. MARSHALL: Since we have the Notice out, I'm going to have a copy of the Notice marked.

(Deposition Exhibit Number 1 was Marked for Identification).

MS. MARSHALL: While we have the deposition Notice out, Mr. Artz, if we could go through it and if you could tell me who will be

produced by MDI to testify regarding various subject matters.

Under Roman numeral heading number two subject matter starting on the unnumbered page of the deposition, first paragraph is paragraph number one.

MR. ARTZ: Let's just go through the different categories. The category number one, the witness to be produced is John Sarkisian. Under category two, as to the WindMaster, the pertinent person would be Robert Sarkisian. Actually, he does have knowledge as of the SteelMaster, too, although we've objected to that since the Steel Master trademark is not at issue.

Category three, John Sarkisian. Category four, that'll be a Julie Holl, Glenda Beau, B-E-A-U, John Sarkisian again. And there's also another witness possibly called Mara; I forget her last name. Bitte, Mara Bitte.

MS. MARSHALL: What is she on your original witness list?

MR. ARTZ: No, she's on the revised witness list.

MS. MARSHALL: I think we're on category five.

* * * * *

[Pages 6-40 omitted]

were asked to make something that was not so heavy and more compact.

Q. When you say we, who are you referring to?

A. Marketing Displays. Our engineering department was asked to develop the product so that it would be lighter and more compact.

Q. I'm sorry. Were you finished?

A. Yes.

Q. I didn't mean to interrupt you.

And what product followed this in the line of traffic control products?

A. The one that we are selling today basically. you probably have brochures.

MR. ARTZ: When we find a convenient place to take a break.

MS. MARSHALL: Do you mind if I just get this marked, then we can do it right after this?

MR. ARTZ: No.

(Deposition Exhibit Number 6 was Marked for Identification.)

Q. (By Ms. Marshall) Mr. Hillstrom, I'm going to show you a document that has been marked as Hillstrom Exhibit Number 6. Is that the type of

sign stand you developed after Hillstrom Number 5?

A. That's correct.

Q. And can you tell me in what year that sign stand was developed?

A. Again, we were doing in 1976 I believe it was developed.

Q. And again, would there be drawings in the engineering department that would show us that change?

A. Yes.

MS. MARSHALL: Is this a good time now, John?

MR. ARTZ: Yes.

(A recess was taken.)

(Back on the record.)

MS. MARSHALL: We're back on the record.

Q. (By Ms. Marshall) Before the break, we were talking about the change in design of traffic control sign stands from Hillstrom Exhibit Number 5 to the design depicted in Hillstrom Exhibit Number 6. Can you tell me the reason you changed from the design of Hillstrom Exhibit 5 to the one depicted in Hillstrom Exhibit 6?

A. So we could make them more compact and

lighter weight product.

Q. And how is that accomplished between Hillstrom 5 and Hillstron 6?

A. Obviously, the width, the springs' spread far apart on this original WindMaster base were taking up too much space. So by moving the springs close together and putting them on a compact base, we were able-- and with folding legs--we were able to reduce the area in which the sign would--the amount of space the sign would take.

Q. Effectively, you reduced the size of the base; is that correct?

A. That's correct.

Q. And would that reduce the amount of material that was required for the base as between Hillstrom 6 and Hillstrom 5?

A. That's correct. The material that was going across each of these legs and the material that was going from this point to the base on that side and this point to the base on the other side.

Q. Was Hillstrom 5 made out of aluminum or steel?

A. It was made out of steel. That was also an added weight.

Q. Was the steel painted?

A. Painted steel.

Q. What color was it painted?

A. Black.

Q. Was the whole sign stand black?

A. The whole sign stand was painted black.

Q. Now, is it generally fair to say manufacturing, if you reduce the amount of material that something requires to make, you reduce the cost of making that product?

A. Not always.

Q. When would that not be true?

A. Because one material is more expensive than another material. Aluminum is more expensive than steel, for example.

Q. Given that all other things are equal, if you reduce the size or the amount of material necessary, is it fair to say that--

A. That's true.

Q. I need to finish my question. With all other things being equal, if you reduce the amount of material, is it fair to say that you also reduce the cost of the item?

A. Yes.

Q. Now, you changed from the design of Hillstrom 5 to make it lighter. Had you received

comments from anyone in the field regarding the weight of the product?

A. Yes.

Q. Can you tell me about some of those?

A. They said it was too heavy and took up too much space.

Q. Do you know the frequency of those?

A. Well, they were frequent enough to make us change the design.

Q. And did you work with Mr. Sarkisian in changing the design from Hillstrom 5 to Hillstrom 6?

A. Somewhat. He played a supporting role.

Q. What other changes were made between the design of Hillstrom 5 and Hillstrom 6?

A. Well, in order to make the springs closer together, we had to change the upright to a single upright.

Q. Why is that?

A. So that the--well, because this had a wide upright. The original design was spread apart, so it was an upright shape like this.

Q. And that's that U or V shaped that's shown on Hillstrom 5?

A. Yes.

Q. And then in order to bring the springs closer together, you needed to use only a single upright, correct?

A. That's correct.

Q. What are some of the other changes between Hillstrom 5 and Hillstrom 6?

A. We changed the legs from steel to aluminum, and we changed the legs to four individual legs as opposed to two U-shaped legs, and we changed the brackets.

Q. So you changed quite a bit?

A. Yes, we did.

Q. Is a single upright a better design for a traffic control sign than say the U-shaped bracket or sign holder of Hillstrom 5?

A Not necessarily. It could be. They both worked.

Q. But for some reason the design of Hillstrom Exhibit 5 was not favored by the people in the field?

A. Primarily because of the weight and the space that it took.

Q. And part of the space was the springs. And that necessarily also meant you had to have a U-Shaped bracket that was farther apart at that

bottom?

A. That's correct.

Q. Do you know out of the designs on Hillstrom 5 and Hillstrom 6, which was lighter?

A. This design was lighter.

Q. And that's the one on Hillstrom 6?

A. Yes.

Q. As between the design depicted on Hillstrom 5 and the design depicted on Hillstrom 6, was there any significant difference in the cost of to manufacture?

A. Yes, it was lower cost to manufacture 6. But it wasn't a big amount.

Q. How was the design of Hillstrom 6 received by the people in the field?

A. Very favorably.

Q. Did you do any testing with the design of Hillstrom 6?

A. Yes, we did.

Q. And did you do that before you marketed the product?

A. Yes, we did.

Q What type of testing did you do?

A. We tested it with our customers. We made models that we gave to our customers to try out as

* * * * *

[Pages 48-106 omitted]

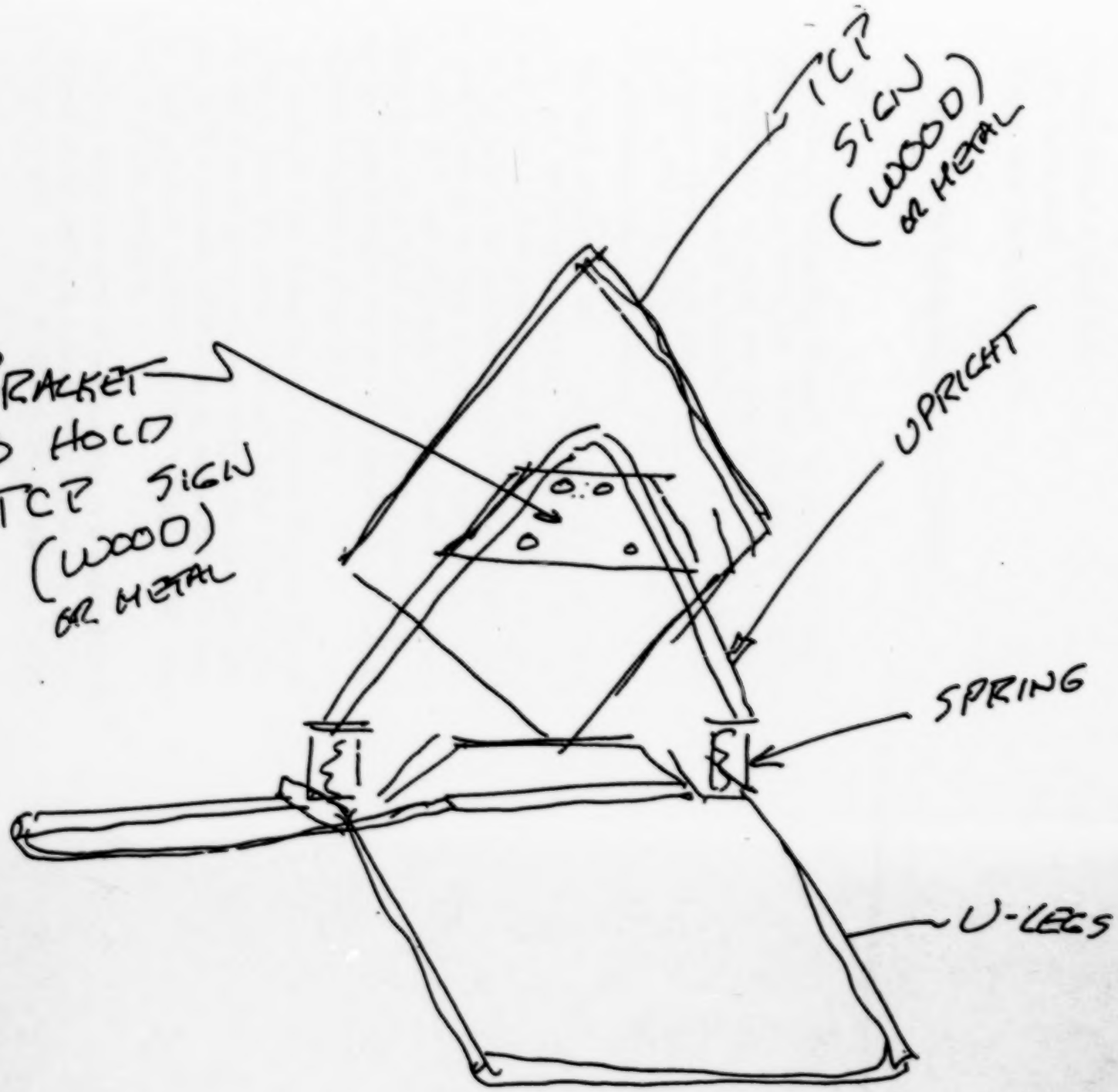
STATE OF MICHIGAN)
COUNTY OF MACOMB)

Certificate of Notary Public

I do hereby certify that the witness, whose attached testimony was taken in the above-entitled matter, was first duly sworn to tell the truth; the testimony contained herein was reduced to writing in the presence of the witness by means of stenography; afterwards transcribed; and is a true and complete transcript of the testimony given by the witness.

I further certify that I am not connected by blood or marriage with any of the parties, their attorneys or agents; and that I am not interested, directly or indirectly, in the matter of controversy.

/s/ Pamela D. Cameron
PAMELA D. CAMERON, CSR-5097,
Certified Shorthand Reporter
Notary Public, Macomb County, Michigan
My Commission Expires: July 19, 2000



Hillstrom
EXHIBIT NO. 5
9-23-96 F

BEST AVAILABLE COPY

June 29, 1995

Eastern Metal of Elmira, Inc.
1430 Sullivan St.
Elmira, New York 14901-1698

Re: **Marketing Displays International**

Dear Sirs:

We represent Marketing Displays, International ("MDI") of Farmington Hills, Michigan. MDI is a leading developer and manufacturer of signs and sign stands in the United States, and has secured a number of patents protecting its developments. Five of these patents are U.S. Nos. 4,548,379, 4,569,499, 4,572,473, 4,593,879, and 4,691,892 (copies of which are enclosed for your review).

We have analyzed one of your sign and sign stand systems and have also reviewed several other of your products as set forth in your General Catalog. Based on this review, we believe that at least Model Nos. CV-200, C-202 and C-902 infringe at least one claim in each of the '379, '499, '473, '879 and '892 patents. Specifically, we believe that these products infringe claim 1 of the '379 patent, claim 2 of the '473 patent, claim 5 of the '499 patent, claim 1 of the '879 patent and claim 1 of the '892 patent.

As a result, MDI demands that Eastern Metal of Elmira immediately cease and desist from any further manufacturer, use or sale of such sign stands and account for the past sales to date. In this regard, MDI recently successfully enforced these same patents against another company who was marketing similar products.

Further, from a review of your catalog, it is realized that the Eastern Metal sign stand products designated by at least Model Nos. C-402, C-702, X-500, X-550, X-600 and X-650

infringe the product configuration and trade dress rights that MDI has in its WindMaster sign stands. Due to MDI's long and exclusive advertising, promotion and sale of WindMaster portable sign stands with an upright connected to a pair of closely spaced upright coil springs positioned on a narrow base with angled legs extending therefrom, such products have secured a secondary meaning in the marketplace. These sign stands have become a source indicator for MDI in the marketplace and their trade dress constitute protectable intellectual property rights.

Since the C-402, C-702, X-500, X550, X-600 and X-650 sign stand products are copies of MDI's corresponding WindMaster sign stand products, we also demand that you cease and desist from any further manufacture, promotion or sale of such products.

We would like to receive a reply to this letter within twenty (20) days, that is by July 20, 1995.

Very truly yours,

/s/ John A. Artz

John A. Artz

JAA/dg
Enclosures

cc: Mr. Aram Najarian
Ms. Lisa Sarkisian

August 21, 1995

LETTER (w/o encls.) VIA FACSIMILE
Confirmation Copy (w/encls.) via First Class Mail

John A. Artz, Esquire
Brooks & Kushman, P.C.
1000 Town Center, 22nd Fl.
Southfield, MI 48075

RE: Marketing Displays International
Your File: MDI 0377 IVI
Our File: 4452-4

Dear Mr. Artz:

This is in response to your letters of June 29, 1995 and July 20, 1995 regarding Marketing Displays International's (MDI's) notice of patent, product configuration and trade dress infringement to Eastern Metal of Elmira, Inc. (hereafter "Eastern Metal"). The issues of patent infringement and product configuration/trade dress infringement are addressed under separate subheadings below.

MDI's Assertion of Patent Infringement

We have carefully reviewed Eastern Metal's sign stand model Nos. C-200, C-202 and C-902 in view of MDI's U.S. Patent Nos. 4,548,379 (claim 1); 4,569,499 (claim 5); 4,572,473 (claim 2); 4,593,879 (claim 1); and 4,691,892 (claim 1). After reviewing the patent claims and the file histories for these patents, we do not believe that the Eastern Metal C-200, C-202 and C-902 stands or any of Eastern Metal's sign stand systems utilizing these stands infringe the noted claims of any of the above patents. All of the above-referenced claims include specific means-plus function limitations regarding the attachment of the sign to the stand. As you know, these "means" are limited to the corresponding

structure described in the patent specifications, and equivalents thereof. That is, the MDI patents are limited to the specific channel structures for slidably receiving the vertical cross brace. None of the Eastern Metal stands or sign stand systems includes all of the elements in any of the above-identified claims, either literally or as an equivalent. As you know, Eastern Metal uses a screw operated clamp to secure the vertical cross brace to the sign stand.

Eastern Metal has been producing roll-up signs and stands of the type that are charged to be infringing since the late 1970's. Enclosed are copies of several Eastern Metal's price sheets which reflect the types of roll-up signs with fiberglass battens (cross-braces) which were available for use with various sign stands at least as early as 1979. Michael Knapp, who is currently President of Eastern Metal, was a salesman for Eastern Metal during this time period and has extensive notes in his daily logs starting at least as early as 1977 detailing various product developments and innovations as well as numerous sales calls regarding signs with fiberglass battens. These signs were used in conjunction with various sign stands which supported the signs by attachment to the horizontal or vertical battens at least one or more years prior to the effective filing date of any of the MDI patents.

Aside from the above information, also enclosed is a copy of Eastern Metal's U.S. Patent 4,309,836, which has a filing date of May 27, 1980. Sign stands according to this patent were available at that time for both metal and roll-up signs. This reference discloses signs having a vertical brace, with the bottom of the vertical brace being attached to a resilient strip of material to allow for wind deflection of the sign. Notably, this reference was not considered by the Examiner during the prosecution of any of the applications which resulted in the MDI patents.

Although we believe the enclosed evidence of invalidity is clear and convincing, we understand that MDI may want to view Mr. Knapp's notes and may want to hear Mr. Knapp's corroborating testimony. Michael Knapp has agreed to make

himself available for a deposition in Philadelphia, at MDI's expense, regarding his extensive notes and the products being offered by Eastern Metal in the 1970's and early 1980's, if you need additional information on this.

Eastern Metal strongly respects valid intellectual property rights of others. However, to the extent the asserted claims are contended to encompass the Eastern Metal enumerated products, such claims are invalid in view of Eastern Metal's clear and convincing evidence of prior development and sale of flexible roll-up signs. Eastern Metal will take whatever actions are necessary to defend its rights, and in view of the enclosed information, will request attorneys fees and Rule 11 sanctions if a suit is initiated without further discussing these issues with Mr. Knapp.

From a review of the file histories, MDI has litigated these patents with Dicke Tool. Please advise us of the outcome of this litigation, including whether Dicke Tool has taken a license.

<u>MDI's Assertion of Product Configuration/Trade Dress Infringement</u>

We have similarly reviewed MDI's assertion that several Eastern Metal sign stand products infringe its alleged trade dress rights in the WindMaster sign stand product configuration, namely portable sign stands containing the following elements: an upright connected to a pair of closely spaced upright coil springs positioned on a narrow base with angled legs extending therefrom. However, we find these assertions are also without merit.

Each product configuration element noted above is functional as applied to sign stand products, as is the combination of such elements, as all flexing portable sign stands contain (a) an upright connected to (b) one or more springs on (c) a base with (d) legs extending therefrom. Further, product specifications issued by various public agencies, authorities and departments of transportation for several states call for the use of a pair of closely spaced coil

springs connecting the upright to the sign stand base. Each of the elements comprising MDI's alleged trade dress clearly serve a necessary purpose and are therefore functional.

Additionally, each of these features are incorporated in portable sign stands which are manufactured and sold by third parties. These third parties have for many years used and continue to use these elements in their sign stand products. MDI's claim of "long and exclusive advertising, promotion and sale" of products incorporating these functional elements cannot be supported.

As stated above, Eastern Metal strongly respects the valid intellectual property rights of others. However, in light of the functionality of each asserted element, and in light of the third party use of these elements, we believe MDI's claim of trade dress rights is without support in fact or law.

Conclusion

We trust that the above addresses the concerns raised by your June 29, 1995 letter and concludes this matter. If you would like to arrange for Michael Knapp's deposition, please contact us and we will arrange for a convenient time and location.

Very truly yours,

PANITCH SCHWARZE
JACOBS & NADEL, P.C.

/s/ Martin G. Belisario/RSH
MARTIN G. BELISARIO

MGB:RJH:MLL:cat:lcd
Enclosures
cc: Eastern Metal of Elmira, Inc. (w/o encls.)

January 20, 1993

Ronald L. Panitch, Esq.
Panitch, Schwarze, Jacobs & Nadel
1601 Market Street
36th Floor
Philadelphia, PA 19103-2398

Re: Marketing Displays International
(Our File: MDI 0377 IVI)
Your File: 4452-4

Dear Mr. Panitch:

In response to your letter dated December 29, 1992, we will take you up on your offer to visit the Eastern Metal facilities and check on the inventory on hand of WINDMASTER products. Our sources indicate that Eastern metal has marketed sign stands under the WINDMASTER name which are not legitimate MDI products. MDI personnel have seen these products in the field, although it is uncertain whether they are being purchased offshore or being manufactured at Eastern Metal.

MDI also will consider your offer to have MDI purchase Eastern Metal's inventory of WINDMASTER products. Before committing to do so, however, we would like to know the number of units in Eastern Metal's inventory. Of course, MDI will only repurchase products that were originally acquired from MDI and are still contained in the original cartons so they can be resold.

As we stated earlier, Eastern Metal's infringement and improper use of MDI's trademark is a serious concern to MDI and the matter will have to be resolved promptly if legal action is to be avoided. In this regard, regardless of whether any of the products are repurchased, Eastern Metal will have

to agree to cease use of MDI's copyrighted material, cease use of the "WM" and "XWM" designations, and further cease use of the "412", "418", and "460" designations. There also is the matter of the existing catalogs which contain MDI's copyrighted materials. Either these materials will have to be destroyed or a reasonable payment made to MDI for use of the drawings.

We look forward to your immediate reply.

Very truly yours,

/s/ John A. Artz
John A. Artz

JAA/dg
cc: Marketing Displays Int'l

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,
Plaintiff(s)

-vs-

TRAFFIX DEVICES, INC.,
Defendant(s)

Case No:
95-CV-40230

DEPONENT:	KENNETH L. HYDE
REPORTER:	Marlana Willick, CSR-3426
DATE:	Friday, February 14, 1997
TIME:	9:30 a.m.
LOCATION:	1000 Town Center Southfield, Michigan

[Pages 2-12 omitted]

someone back at the home office?

A. I'd say that's a possibility, yes.

Q. Do you know for certain why that was?

A. No.

Q. I got a little ahead of myself.

If you'll go back please and summarize your formal education beyond high school, I'd appreciate it.

A. High school is it.

Q. Did you take any sort of training courses or seminars since you graduated from high school?

A. Yes, but I'm not sure I can tell you what they were. It's been a long time ago.

Q. What about your--well when did you graduate from high school?

A. 1956.

Q. What has been your full time employment since 1956 when you graduated from high school?

MR. ARTZ: You asked him his work experience after high school until now, is that what you're asking?

MS. MARSHALL. Well what did I say?

That's what I meant, if that's not what I said.

MR. ARTZ: You said full time employment. It was a little ambiguous, that's all.

* * * * *

[Pages 14-42 omitted]

wasn't tested at the airport along with those other tests, but in terms of what you asked me, which was side twist, I can't address that.

MR. ARTZ: You want his opinion when it's favorable without any tests, but if you don't like his opinion then you try to downgrade it by saying there are no tests.

MS. MARSHALL: Counsel, I'm asking questions. If you don't like them, you have a chance to cross-examine him.

MR. ARTZ: It's a statement of fact, that's all it is.

MS. MARSHALL: Well your statement of fact is noted for what it's worth.

Q. Have you ever told a customer that the WindMaster product is superior to the competing products that the customer may be considering?

A. Well sure.

Q. What competing products have you told your customers that the WindMaster product is superior to?

A. Well in order to sell a product, as far as I'm concerned it is a superior product.

Q. What makes it a superior product?

A. Quality, ease of use, the ability to repair with replacement parts, and the readily available

replacement parts. The four year warranty on WindMaster.

Q. What about the performance.

A. Performance is comparable. They're very close.

Q. Are you aware of any customers being unhappy with any competing products?

A. Let me think about that. I think the only one that immediately comes to mind, is I have heard some complaints about the small Traffix sign stand. I'm talking about small, their non spring loaded.

Q. Anyone else?

A. That's all that I really -- there have been some complaints that -- no, I think generally speaking everybody's works pretty well.

Q. You don't recall any complaints about any other company's signs?

A. Nothing specific, no.

(Exhibit No. 1 was marked for identification.)

Q. Mr. Hyde, I'm going to show you a document that's been marked as Hyde Exhibit 1.

Is that your signature that appears on that document?

MS. MARSHALL: I have one for you also,

* * * * *

[Pages 45-70 omitted]

contacted anyone about selling MDI's product?

A. I do not know, I do not.

Q. Do you know whether Mr. Freeman sells the Windbuster product?

A. I do not. I don't think so.

Q. Are you aware of any other instances during your time with MDI that a customer has evidenced what you would consider confusion has evidenced what you would consider confusion as between MDI and Traffix and any of its products?

A. If you're looking for specifics, dates, names, and telephone numbers, no. But I can tell you in general that there is confusion relative to WindMasters and any other--and spring stands on the market. People generally are looking at WindMasters as a dual spring unit and they know us as that.

Q. What makes you think that there is confusion?

A. Well they tell us.

Q. What do they say? Who's they?

A. Well I just told you, I couldn't give you specifics. I don't write it down.

Q. How often does that occur?

A. Numbers of times.

Q. Once, twice, what numbers are we talking about?

A. Twenty or more.

Q. Since the time you've been with MDI?

A. Um-huh.

Q. And you can't think of a specific instance right now other than the one you recounted in your declaration; is that correct? You can't give me a name or time?

A. No, I can't.

Q. Or place?

A. No.

Q. Do they mention WindMaster versus Windbuster, do they seem to mix that up?

A. I'd have to say yes. But I can't give you specifics.

Q. How did MDI find out that you had received the message from Mr. Freeman?

A. How did they find out? Called them on the telephone.

Q. Who did you talk to?

A. Probably John Sarkisian.

Q. Do you recall what you said?

A. Same thing I said here.

Q. Do you recall Mr. Sarkisian's reaction?

A. Not specifically. Concern, I guess.

Q. Did he have you call the attorneys, or did you talk to him about it more than once?

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

vs

TRAFFIX DEVICES, INC.,

Defendant.

Case No.
95-CV-40230

DEPONENT:	PETER SCULLEY
DATE:	Thursday, February 12, 1997
TIME:	2:30 p.m.
LOCATION:	Brooks & Kushman
	1000 Town Center, Suite 2200
	Southfield, Michigan
REPORTER:	Rene L. Twedt, RPR/CSR-2907

[Pages omitted]

have.

Q. Would you summarize your formal education beyond high school?

A. I went to Drexel University and got a Bachelor of Science in marketing.

Q. Where is Drexel University?

A. In Philadelphia.

Q. And in what year did you receive your Bachelor's in marketing?

A. 1971.

Q. And do you have any other formal education besides Drexel University?

A. No.

Q. And since graduating from Drexel University in 1971, would you please summarize your full-time work experience, and would you include the years during which you were employed and the positions you held?

A. Okay.

MR. J.A. ARTZ: Would you like to refer?

THE WITNESS: Yes, I would like to jog my memory.

MR. J.A. ARTZ: I told him to write it down, since he was having a problem with dates,

* * * * *

[Pages omitted]

Q. Okay. And do you make phone calls to try and solicit business as part of your average week in working for MDI?

A. Sure.

Q. Do you know about how many phone calls you would make per week?

A. Wow, that all depends. Maybe twenty, something like that. See, it's not just soliciting business, it's keeping up relationships. It's not like every time I call someone I'm asking for an order.

Q. Okay.

A. But yeah, there is twenty or thirty phone calls maybe during the course of a week.

Q. Soliciting orders, and then are there--strike that.

Are there twenty to thirty phone calls a week soliciting orders, or is that just generally the number you make including following up with present customers?

A. That's everything.

Q. About how many sales calls do you make on a monthly basis?

A. That depends. I'd say probably about twenty.

* * * * *

[Pages 18-43 omitted]

or whatever. I do remember that.

Q. And then he also thought the WindMaster was the same as Windbuster; correct?

A. Yes.

MS. MARSHALL: Why don't we take a short break, okay.

(Brief recess.)

BY MS. MARSHALL:

Q. Mr. Sculley, have there been any other instances where you felt that a customer was somehow sort of confused between MDI and TrafFix or the products that are manufactured by either company?

A. That's the only one that I can specifically recall. There may have been some other things in the past, but as I say, TrafFix, I don't think, sells a lot of sign stands in my general area.

Eastern Metals is a bigger player. Dickey would be a much bigger player in my territory as a competitor than TrafFix for sign stands.

Q. So that the incident with Mr. Lund is only one that you can recall right now?

A. Right.

MS. MARSHALL: Why don't we go on the confidential record.

(Confidential Record commenced.)

* * * * *

State of Michigan)

County of Oakland)

Certificate of Notary Public

I do hereby certify the witness, whose attached testimony was taken in the above matter, was first duly sworn to tell the truth; the testimony contained herein was reduced to writing in the presence of the witness by means of stenography; afterwards transcribed; and is a true and complete transcript of the testimony given.

I further certify that I am not connected by blood or marriage with any of the parties; their attorneys or agents; and that I am not interested, directly or indirectly, in the matter of controversy.

In witness whereof, I have hereunto set my hand this day at Troy, Michigan, County of Oakland, State of Michigan.

/s/ Rene L. Twedt

Rene L. Twedt, RPR/CSR-2907

Registered Professional Reporter

Certified Shorthand Reporter

Notary Public, Oakland County, Michigan

My Commission Expires: July 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

v.

TRAFFIX DEVICES

Defendant.

Civil Action No. 95-CV-402330

Hon. Paul V. Gadola

SUPPLEMENTAL EXPERT REPORT OF KENNETH B. GERMAIN

I, Kenneth B. Germain, declare and state as follows:

1. I am the same person who signed and submitted an "Expert Report of Kenneth B. Germain" on November 12, 1996. Whereas that Expert Report was devoted to issues of trademark infringement per se, this Supplemental Expert Report is devoted to issues of trade dress infringement. My credentials in the trademark/unfair competition law area are summarized in ¶¶ 1-3 of the Expert Report, and my modus operandus in expert retainer situations is summarized in ¶¶ 4-5 thereof.

Paragraphs 2-6 of this Supplemental Expert Report provide "background" specific to the protectability of product configuration trade dress. The remainder of this Supplemental Expert Report addresses the specific arising in this case.

Exhibit 4 attached hereto lists materials now relied up in addition to those listed in Exhibit 3 to my Expert Report.

2. The title of the book which I used for years in my law school course (long known as "Unfair Trade Practices," and later restyled "Introduction to Intellectual Property") is indicative of the nature of the subject at hand. This title, *Legal Regulation of the Competitive Process,* focuses attention on the centrality of competition in our economic system. In this system, competition is "the rule," whereas insulation from competition is the "exception." Anti-trust law, as reflected in such statutes as the Sherman and Clayton Acts, is one major corpus juris that furthers this approach. The law of "unfair competition" (sometimes referred to as "unfair trade practices"), which includes trademarks and "trade dress," is another relevant corpus juris. It is expected that the competitive arena will be quite rough and tumble; it is anticipated that leaders in a particular field will be targeted by aspiring competitors, and that similar approaches to product designs and sales techniques will, at a minimum, be considered by the newer entrants to an arena. In short, usually the first step in "building a better mouse trap" is assessment of the designs of the best of the mouse traps available in the market, combined with consideration of how to make these designs even better.

3. Consistent with the content of the previous paragraph, courts, often acting without legislative guidance, have realized and relied upon the well-understood basis that "the rule" is free and open competition--including considerable imitation--and that "exceptions" to this rule are to be recognized only in certain carefully circumscribed situations, some of which are legislatively defined and some of which are judicially defined. The patent and copyright systems, for some time now entirely prescribed by federal

statutes, are examples of legislatively mandated "exceptions" to "the rule" of free and open competition; accordingly, the courts which construe these statutes typically view them with scrutiny so that these "exceptions," which involve partial monopolies for limited lengths of time, do not become dangerously overexpansive. Trademark law can be viewed as another "exception," but it is basically judicial in origin, and the federal statutory scheme (notably the Federal Trademark Act of 1946 - better known as the Lanham Act - 15 U.S.C. § 1051 et seq.) in large part does not have the same monopolistic dangers as the other systems. This is because there is a virtual infinity of "words, names, symbols" available to indicate the sources of products.

4. It is also noteworthy that the off-used term "unfair competition" has a powerful internal inconsistency. That is, whereas in our system the term "competition" is viewed in a very positive way - being good for the consuming public, which benefits from the vigor of the various competitors' efforts to best each other - the term "unfair" has a very negative nature which indicates that there are limits on the extent to which competition will be permitted. To some significant extent, the term "unfair" is defined by time-specific factors; particularization for geographical areas and/or industrial fields sometimes also is necessary.

5. The interplay between federal regulation of the competitive system, as exemplified by the patent and copyright statutory schemes, on the one hand, and state regulation of competition, on the other hand, has been in the forefront for at least 30 years now. In 1964, the United States Supreme Court's classic companion cases of *Sears* and *Compco* set the stage for close and constant concern about state intrusion into the federal domain, with the Supreme Court seeking to assure vigorous competition involving "inventions" and "writings" that were <u>not</u> federally protected. Such judge-made concepts as the trademark law/unfair competition doctrine known as "functionality" have close connection to this federal pre-emption matter.

6. There also is a continuum running from the most traditional of "trademarks," such as words, names, and visual symbols, to an intermediate category comprised of traditional "trade dress," such as the designs and layouts of packages for products, and then extending to "product configuration," such as the shape, coloration and overall appearance of the actual features of products per se. (In very modern times, this continuum has been complicated by the addition of "service dress," such as the decor of restaurants.) It is crucial to note that as one moves along this continuum, the importance of competition increases significantly; thus, protection of the first comer's labels and packages is somewhat less easily conferred than protection of ordinary words/names/symbols, and protection of the configuration of a party's goods is very less willingly conferred. There even are situations in which "de facto" distinctiveness, usually resulting from being the first firm to enter a field with a particular "dress," will *not* be found to be "de jure" cognizable, either because of the importance of "the rule" of free and open competition, or because of the primacy of the federal system and its inherent limits on the systems of the states.

7. As I understand it, Plaintiff in this case is claiming that Defendant's portable sign stands (which are sold under the trademark WINDBUSTER) violate Plaintiff's rights by infringing the "trade dress" comprised of a certain combination of specified design features of Plaintiff's portable sign stands (which are sold under the trademark WINDMASTER).

8. The trade dress matter requires consideration of some complicated legal issues:

(a) Whether Plaintiff's "trade dress" actually serves a trade identity function, i.e., identifies and distinguishes Plaintiff's goods as Plaintiff's and <u>not</u> as those of/from other suppliers of similar goods.

(b) Whether Plaintiff's "trade dress" is sufficiently "distinctive," either inherently or through acquisition of "secondary meaning," to warrant a finding of validity.

(c) Whether Plaintiff can demonstrate that its "trade dress" is primarily "nonfunctional."

(d) Whether Defendant's "trade dress" in its entirety - including its trademark per se[1] - is likely to be confused with Plaintiff's "trade dress" in its entirety - including its trademark per se.[2]

(e) Whether the protection sought for Plaintiff's "trade dress" is inconsistent with - and precluded by - preemption principles that require that the features of such "trade dress" be protectable, if at all, by patent law.

9. It seems that the "answers" to the issues posed in ¶ 8 are as follows:

(a) Plaintiff's "trade dress" fails to serve as an element of trade identity: rather, it serves merely as a convenient combination of predominantly utilitarian features of a portable sign stand.

(b) Plaintiff's "trade dress" does not appear to be inherently "distinctive" of its goods; furthermore, "secondary meaning" has not been established.

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[1] The appearance of the parties' trade *names*, i.e., their company names ("Marketing Displays, Inc."; "TrafFix Devices, Inc."), on their respective products also is of relevance.

[2] Priority of use, a required factor, seems to be established by Plaintiff, based upon apparently uncontested evidence.

(c) Plaintiff's "trade dress" is comprised of features most of which, taken individually, are or may be primarily "functional," and which, taken in combination, fail to qualify as "primarily nonfunctional."

(d) Defendant's "trade dress," - viewed along with its trademark per se - is not sufficiently similar to plaintiff's trade dress - viewed along with its trademark per se - so as to be likely to cause confusion.

(e) Plaintiff's "trade dress," relying heavily as it does on features encompassed in Plaintiff's (expired) patents, rightfully belongs to the public, including competitors such as Defendant; as such, "trade dress" protection must yield to patent law preemption.

It is Plaintiff's burden to establish elements (a), (b), (c), *and* (d); in other words, Plaintiff does *not* have an actionable case unless it can establish *all* of these elements. However, I believe that Plaintiff has not established *any* of them. Moreover, I believe that Plaintiff's trade dress claim should be barred by element (e). Thus, it is *my opinion* that Plaintiff cannot maintain a cause of action for "trade dress infringement" against Defendant in this case.

10. Regarding issue (a): Since "trademarks" and closely related aspects of "trade identity" (such as "trade dress") must serve to identify and distinguish the user's goods/services, there is an initial issue of whether a particular claimed feature or combination of features really serves this purpose. Contrary to some suggestions, the only choices are not "descriptive" and "distinctive." Design features may not be "descriptive," but yet they may not be "distinctive," because they are commonplace and thus not likely to be viewed as serving a differentiating function. This is undoubtedly true in relation to basic geometric shapes, such as circles and cylinders.

In the current factual situation, there does not appear to be evidence of a trade identity effect of Plaintiff's design features: the ordinary overall "look" of Plaintiff's portable sign stands appears merely to be the nature of the creature, namely, a relatively light-weight, flexible sign stand that is designed to avoid being blown over or pushed aside.[3] The loose, overbroad language and philosophy espoused by the United States Supreme Court in its 1992 Two Pesos decision has *not* been accepted without reservation by the lower courts -particularly most of the United States Courts of Appeals that have had the opportunity to comment on it - and it must be taken with a "grain of salt." In any event, the application of the referenced overbroad language/philosophy in Two Pesos would not change my opinion in this case.

11. Much of what was said in ¶ 10 also has application to issue (b), "distinctiveness." Specifically, for distinctiveness to be deemed "inherent," it should be unusual, eye-opening, immediately suggestive of source-indicativeness. It is *not* appropriately considered "inherent" where, as here, a number of ordinary features are combined in an overall ordinary way, for the apparent purpose of accomplishing a particular functional "task."

12. Issue (c), "nonfunctionality," is anything but a clear, simple concept. The burden of proof lies with the plaintiff to show that its claimed "trade dress"- overall, not merely its divisible components - is "non-functional." At bottom, the crucial question is whether the plaintiff's particular combination of features serves primarily an identifying purpose ("trade identity") rather than a/the purpose of being

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[3] A relevant factor is the apparent absence of prominent advertising or trade literature that effectively informs the relevant "consumer" of the allegedly intended linkage between Plaintiff's product design and Plaintiff per se. Indeed, Plaintiff's failure to identify/claim any aspect of "trade dress" in its advertising/trade literature-which, in fact, expressly identified its patents, copyrights, and trademarks - undermines its later-raised "trade dress" claims.

easier or cheaper to make, operate, or maintain, or being mechanically superior, such that limiting its use (by excluding all but the plaintiff) would not unduly hinder competition. In more direct terms: if the plaintiff's overall design is one of a relatively small number of effective ways to configure a portable sign stand, etc., then *unless protected by patent*, this design must be left open and available to competitors. These competitors should not have to use lesser designs: this would be improperly anti-competitive.

As I understand it, Plaintiff has claimed as its trade dress the structural features of its portable sign stand, namely the closely-spaced, vertically-oriented dual springs mounted on a short horizontal base, itself connected to four skewed legs. Clearly, these features are functional in a utilitarian sense. A dual-spring design is unquestionably superior, particularly for use with rigid highway construction signs, since such a design provides maximum stability by minimizing twisting of the sign around its vertical axis under the force of high winds. In fact, Plaintiff argued these points in the "prosecution" of its patent application, to support patentability of its design. In addition, to produce a sign stand which folds up into a compact, easily portable configuration, the springs must be closely-spaced. This, in turn, means that the legs forming the base must be skewed, so as to provide maximum stability against toppling over. Four legs, of course, most efficiently provide the maximum base support and stability.

13. Plaintiff has not shown that there are alternative designs available which are as cost effective to produce, while maintaining the same quality and acceptability in the marketplace. Sign stands with heavy (e.g., cast iron) bases may resist toppling, but they are not compact or easy to transport. Sign stands having a single spring do not provide nearly the wind resistance benefits as do dual-spring designs, particularly for application to rigid road construction signs.

Hence, most of the features of Plaintiff's overall design are "functional," and the combination of these features has been effected in an ordinary manner that is *not* "primarily

nonfunctional." In other words, the whole does *not* appear to be greater than the sum of its parts. Further, no alternative designs are available which are as cost effective to product while maintaining the same quality and acceptability to consumers in the marketplace.

14. Preliminary to discussing issue (d), "likelihood of confusion," it must be kept in mind that the "items" to be considered nor are the "trade dress" of Plaintiff's portable sign stand and the "trade dress" of Defendant's sign stand - as both of these are perceived in the "market" by ordinary purchasers and users. Thus, the various features focused upon individually for certain analytic purposes must be put in context, including such non-"trade dress" items as trademarks per se, particularly as displayed in the parties' respective logostyles. As with issues (a) - (c), the burden of proof lies with the Plaintiff.

15. Every jurisdiction (in the federal judicial system, every "Circuit") has its own customized list of likelihood of confusion "factors." However, the gist of these lists is the same all over: certain "market" factors, plus the defendant's intent and possible proof of actual confusion, fill out the list. While the entire list of factors always is potentially worthy of analysis, sometimes certain factors are inapplicable, and sometimes certain factors are so powerful and so important as to preclude consideration of certain other factors.

16. "Strength" of the plaintiff's "trade dress" is a good place to start. From the plaintiff's perspective, the stronger the better, since wider and deeper protection are more likely to follow. In the current case, as suggested earlier in this Supplemental Expert Report, Plaintiff's purported "trade dress," *in my opinion*, is very weak and apparently has not been featured in a fashion calculated and likely to make it known as a trade identifier. This factor strongly favors Defendant.

17. Similarity of the parties' "trade dress" is probably the single most important factor - for obvious reasons. If this

fails, all fails. Here the similarities (substantial similarity of overall design and specific components, - attributable, however, largely to such totally functional aspects as the nature and location of the springs, base, and legs of the parties' sign stands) are considerable, but they are tempered by the dissimilarities of the words (except for the descriptive item "wind"), brackets, and colors comprising the parties' respective trademarks, trade names, and products per se. Overall, this factor favors Plaintiff - but only weakly.

18. Similarity of the parties' products is another crucial factor. Where, as here, the parties' products are functionally similar to each other (aluminum portable sign stands v. steel portable sign stands), but differ in composition, color, weight, and cost - resulting from the differing natures and qualities of aluminum and steel - the products must be viewed as closely related, albeit differentiable - especially by experienced, knowledgeable bulk buyers. Overall, this factor favors Plaintiff - but not fully.

19. Similarity of the trade channels in which the parties' products flow to buyers and users is another significant factor. Where, as here, there is identity - not merely "similarity" - of trade channels, this factor fully favors Plaintiff.

20. Another "market" factor is the care likely to be exercised by members of the public in viewing and dealing with the parties' respective products in the market place. Generally, high-priced goods - including goods that are purchased in bulk, so that their composite cost is high - beget considerable care in the buying process. Also, the sophistication of the normal purchasers of the subject products is relevant. Where, as here, such purchasers appear to be sophisticated professionals buying for commercial/industrial purposes - and relying in large part on the parties' completely different corporate *names* ("Marketing Displays, Inc." v. "TrafFix Devices, Inc.") - their tendency to be confused as to the source of the goods they are procuring is very low. Thus, this factor strongly favors Defendant.

21. The intent of the defendant in adopting its "trade dress" can be quite relevant. Although an entirely innocent or even ignorant state of mind (vis-a-vis plaintiff's pre-existing "trade dress") does not exonerate a junior party from liability if the market factors persuasively point to "likelihood of confusion," a bad faith state of mind can raise powerful inferences of distinctiveness (e.g., of plaintiff's "trade dress") and of confusability. However, it is clear that similarities per se do not prove "bad faith," and indeed not even "copying" per se proves "bad faith." It must be remembered that free competition is "the rule."

In the current case, the "facts" indicate that Defendant designed its sign stand with full knowledge of and to some degree in approximation of Plaintiff's design. However, Defendant reasonably may have believed that it was permissible to copy some of Plaintiff's features - particularly the most "functional" ones, which tended to be disclosed in Plaintiff's (expired) utility patents. (See ¶ 24, infra, in this Supplemental Expert Report.) Consequently, such copying does *not* evidence "bad faith," and is *not* significant in the current likelihood of confusion analysis. Thus, this factor does not favor Plaintiff.

22. Palpable proof of actual confusion - of goods, source, or sponsorship - can be powerful evidence of "likelihood of confusion." To the contrary, under certain circumstances, the *absence* of palpable - quantitatively and qualitatively - evidence of actual confusion, can strongly suggest non-confusability. Where, as here, Defendant sold a substantial number of its sign stands in the same geographic and product markets as Plaintiff sold its sign stands - sometimes competing head-to-head - over a period exceeding two years, and where, as here, there is utterly *no* evidence of "actual confusion" stemming from "trade dress" matters - this factor strongly favors Defendant.

23. In *my opinion*, the overall effect of the relevant market factors - indicated in ¶¶ 17-19 as in varying degrees pro-Plaintiff, but in ¶¶ 16, 20 and 22 as strongly pro-

Defendant - along with the lack of proof of the intent factor (see ¶ 21), make it clear that the Plaintiff has *not* carried its burdens in establishing "likelihood of confusion."

24. With reference to issue (e), the preemptive effect of the patent laws on trade dress protection for features that are, were, or could have been covered by patents, it seems completely clear that Plaintiff is estopped from denying the functionality of its sign stand "trade dress" design. The salient features of such "trade dress" - notably the closely spaced vertical springs mounted on a short horizontal base itself connected to four skewed legs - all are covered (either directly or indirectly) by the Plaintiff's expired utility patents (U.S. Patent No. 3,646,696 and U.S. Patent 3,662,482). Although these patents disclose and describe a sign stand with widely-spaced springs and widely-spaced parallel legs, such a design has been construed to be the functional equivalent to a similar device with dual closely dual spaced springs and skewed legs in Sarkisian v. Winn-Proof Corp., 203 U.S.P.Q. 60, 67 (D. Ore. 1978), aff'd, 213 U.S.P.Q. 912, 926 (9th Cir. 1981).

In Sarkisian, the court found a closely spaced dual spring and skewed leg design to fall within the scope of, and therefore to infringe, Independent Claim 3, and Dependant Claims 4 and 5 (of the total of 5 claims) in the '696 patent, and Independent Claims 1 and 2 (of the total of 3 claims) in the '482 patent, under the Doctrine of Equivalents. Thus, the closely-spaced dual spring and skewed leg design now claimed as Plaintiff's trade dress has been found to be the functional equivalent of the preferred embodiment disclosed and prominently claimed in these expired patents.

25. Under current concepts already well-established in Circuits other than the Sixth Circuit - notably the Second, Seventh, and Tenth Circuits - it is quite clear that Plaintiff's trade dress claims herein would be barred by its expired patent claims. This is how it should be, and I would expect the Sixth Circuit to follow suit. Thus, *in my opinion*, regardless of whether Plaintiff were to be viewed as establishing a

substantive claim for "trade dress Infringement," such substantive claim would be lost due to patent preemption.

/s/ Kenneth B. Gemain - 12/9/96
Kenneth B. Germain

Report on

MARKETING DISPLAY, INC.

versus

TRAFFIX DEVICES, INC.

submitted to

Reising, Ethington, Barnard & Perry, L.L.P.

by

Russell M. Lewis, Ph.D., P.E.
Consulting Engineer
8313 Epinard Court
Annandale, VA 22003

December 13, 1996

INTRODUCTION

Background

Traffic control devices may be classified as either permanent or temporary devices. Traditionally, temporary applications were considered to be construction and maintenance operations. More recently, however, this classification has been expanded to also encompass utility operations, incident management, emergencies, disasters, and special events.

The purpose of traffic signs is to advise road users as to the proper and orderly use of highways and streets and their adjunct facilities. Information is provided in the form or a legend and/or symbols. Signs fall into three basic categories -- regulatory, warning and guide signs. The conspicuity of signs are in good part determined by the design of the sign face -- its shape, color, and background contrast. At night, key attributes are illumination or retroreflectivity. In addition to elements of the sign face itself, the target value of signs can be enhanced by supplemental devices attached to the sign or sign support systems. Such devices are flags (for daytime use) and flashing lights. Type B lights are effective both day and night, whereas Type A lights are visible only at night.

Safety and Placement

Signs must be place where they can readily be seen and read. Signs must be placed along the roadway at locations that promotes visibility and provide a sufficient opportunity for an appropriate response. Laterally, it is desired that signs be placed close to the travel path in order that they are close to the axis of driver' vision, yet far enough way from the traveled way that they are displaced. A sign that is significantly displaced or knocked down will no longer serve its function. Moreover, a sign that is hit may pose a hazard to the errant vehicle and to other vehicles and bystanders in the vicinity.

Workers depend upon motorists receiving vital information by the means of signs placed upstream of their location. As signs on portable supports are frequently deployed and retrieved, workers are well aware as to how well a sign support system functions in the field. Unlike many items purchased by managers, immediate feedback is available for sign supports that fail to perform adequately.

PROPERTIES OF SIGNS

Two types of sign backings are utilized - rigid and flexible. Rigid signs are far more common, and they are the ones widely used by highway agencies and contractors. All signs that are to be visible at night shall be illuminated or retroreflective. There are few flexible signs that meet retroreflective requirements, thus limiting the use of flexible signs. Some highway agencies prohibit their use, and other agencies simply do not acquire them due to their limitations. The primary use of flexible signs is for crews performing short-term (one daytime work period or less) activities on minor roads.

Sign Placement

Signs used at construction sites are typically required to be installed following the same standards that are applicable to permanent signs. In rural area, they are usually placed at least six to twelve feet from the traveled way and six feet off a paved shoulder. In urban areas they are placed such that the near edge of the sign face is at least two feet behind the curb. Sometimes they may be placed in protected area, such as behind a barrier or affixed to a bridge rail.

Portable signs supports are used primarily for short-term and short-duration work (one hour or less) work activities. Their portable nature and light weight allow these devices to be easily and rapidly and deployed, relocated and retrieved. These characteristics make them ideally suited for maintenance and utility operations on highway and streets. For such applications, signs are typically installed and removed each day, and sometimes they are placed in several

different locations during a single work day. Portable signs are commonly mounted on shoulders, in front of guardrails and in closed lanes.

Sign Size

Sign sizes are specified in *Standard Highway Signs* published by the Federal Highway Administration. This book is incorporated by reference as part of the Federal *Manual on Uniform Traffic Control Devices* (MUTCD). Warning signs having a size of 48 inches are generally required for use on freeway and expressways. Some work zone signs have a minimum size of 36 inches or less. Many agencies, however, specific 48-inch signs for a wide variety of highway types. It is now recognized that a significant portion of drivers (e.g. older drivers) have difficulty reading existing signs. As a result there is a trend towards larger letter sizes and thus larger signs. Sizes of 60 inches are being used in some instances for critical signs on high-speed roadways. The wind-resistant sign supports which are the subject of this litigation, are used primarily for mounting 48-inch rigid signs.

Color

Since national standards for traffic control devices first evolved, yellow has been the color that denoted warning. Some 25 years ago, it was recognized that a distinction should be made between signs warning of temporary conditions and those dealing with permanent situations. The 1971 MUTCD established a separate signs series having an orange background for use with construction and maintenance (C&M) activities. The orange color advised motorists of the following additional hazards that may exits in highway work zones.

- Conditions may be changed from those that previously existed before work commenced.
- The conditions, and therefore the sign messages and placement, may be continually changing as the work progresses.

- There may be additional and unusual hazards, such as closed portions of the roadway, channelizing devices along narrowed travel lanes, adjacent excavations, missing pavement, etc.
- There may be slow moving or stationary equipment operating in or adjacent to the traveled way.
- There may be workers in locations exposed to the hazards of traffic.

Although orange was first specified only as a background color for signs, it was later specified for several temporary traffic control devices. Barricades, vertical panels and drums shall have retroreflective orange stripes. The predominate color of cones, tubes and drums shall be orange. Many construction equipment manufacturers paint their machines orange, and many agencies specify orange for equipment that they purchase. In fact, the color has come to be known as "construction orange."

PROPERTIES OF SIGN SUPPORT SYSTEMS

Given the close proximity of portable sign systems to the traveled way, the dynamic performance of these devices is of critical importance.

Stability

An essential property of a sign support system is stability --the ability to remain in place under field conditions. Stability is commonly achieved by affixing supports to the ground, by making the support system itself heavy, or augmenting its weight with ballast. These methods, however, preclude or at least diminish portability. In response to the need for an effective, light-weight, portable sign support, the traffic control industry developed a class of devices herein called "wind-resistant."

Other than actual impacts, the main culprits to stability are wind and the slip stream crated by the close passage of a large, boxy vehicle. The distinguishing characteristic of this

class of portable sign supports is the mechanism by which the sign face tips to "dump" a wind gust. Because the lateral force of such a gust is effectively dissipated, the need for weight and supplementary ballast is virtually eliminated.

When deployed, the legs of wind-resistant portable signs supports extend widely from the center support and lay close to the ground. This configuration is dictated by the mounting height for the sign and the need for stability. Portable signs are frequently installed close to traffic lanes and near or even encroaching upon walkways and sidewalks. Therefore, it is desirable that the legs be colored such that they are readily seen. Orange is the obvious choice, both due to its brightness and its long-standing warning and work area connotation.

Ballast

The use of ballast on sign supports creates several problems. First of all, ballast by definition is added weight. When a ballasted system is hit by an errant vehicle, the impact force is increased due to the greater mass of the assembly. Furthermore, the ballast may become a projectile that poses a hazard for nearby vehicles or bystanders. Ballast in the form of hard objects, such as rocks, concrete blocks, timbers, etc., has long been prohibited. Such objects can cause vehicles to take dangerous evasive action or, if hit, can cause loss of control.

Although water is occasionally used, the primary acceptable ballast is sand placed in a bag set on lower portions of the device or in a hollow chamber within the device. The advantage of such sand containers is that they crush when driven over and the sand is distributed over the roadway. Although such sand deposits will not create the problems previously defined for hard objects, they create a different hazard. Sand on a pavement can significantly reduce the coefficient of friction and, thereby, greatly diminish handling and braking stopping performance.

Wind-Resistant Mechanism

The wind-resistant mechanism first developed Marketing Displays, Inc. (MDI) consisted of a hinge placed in the mast above the legs and below the sign. The hinge consisted of two springs mounded side-by-side that allowed the mast to tip while supplying a restoring force to return the mast to vertical. The dual-spring configuration provides for flexing primarily in a vertical plane perpendicular to the sign face in response to a wind load imposed on the sign. It also resists any twisting of the mast and thus the twisting of the sign face around the vertical axis. Such twisting is to be avoided, as it is essential that the sign continuously face traffic. Repeated twisting may also result in walking and rotating the sign base.

Specifications developed by some state highway departments for wind-resistant sign supports specifically require two steel springs and in some instances they require that springs be mounted vertically. Highway agencies have recognized the good performance obtained by the WindMaster and SteelMaster devices marketed by MDI and have patterned their specifications in such a manner that other suppliers must utilize similar design features. Therefore, it is not the intent of other suppliers to mimic the appearance of MDI's devices, but rather to achieve requisite performance characteristics. It is understood that TrafFix Devices adopted the dual-spring design subsequent to the expiration of MDI's patent on this mechanism. This was a proper and appropriate means of meeting requirements imposed by major purchasers of these devices.

Sign Height

Two criteria are used for sign height. Permanent signs are mounted high on posts so that they are visible under widely variable conditions, such as the presence of weeds in the late summer or snow banks in the winter. For construction projects, that are inherently long term (more than three days), the typical requirement is that signs be mounted in the same manner. Prior to 1993, the mounting height for post-mounted

signs was a minimum of five feet above the pavement elevation to the bottom of the sign. In the 1993 edition of Part VI of the MUTCD, this dimension was changed to a minimum of seven feet. For signs mounted on temporary supports, the minimum mounting height has been and continues to be one foot above the traveled way. This lower height for portable sign supports recognizes the practical limitation with regard to weight, stability, and portability. However, because the ground generally slopes down away from the traveled way, portable signs must often be placed close to traffic to meet this minimum height requirement.

CHARACTERISTICS OF THE MARKET

Temporary Traffic Control Industry

The temporary traffic control industry has matured tremendously during the past two decades. It has evolved from a few small companies that rented signs and barricades to many large, full-service companies that furnish a wide variety of traffic control devices, products and services. This expansion has occurred concurrent with and in part due to the growth the American Traffic Safety Services Association (ATTSA) since its inception in 1970. A significant and rather unique characteristic of ATSSA is that it has come to encompass the manufacturers of materials and devices and their suppliers as well as the users of these devices -- traffic services companies, contractors, and highway agencies. This close association has created an environment where the users are very familiar with the products being offered.

The vast majority of temporary traffic control device, including portable sign supports, are purchased by knowledgeable and sophisticated companies and agencies. Most state highway departments have a formal submission, testing and review process that devices must pass before they can be used on their facilities. Local agencies in turn may rely upon lists of products approved by their state. Private industry places a high priority on cost effectiveness. Whereas devices used in construction may be written off against a specific

construction contract, devices used for maintenance-type activities and for rental are continually reused. Therefore, first cost, durability and effectiveness all come to play in evaluating which products to purchase. The buyers of such equipment or not likely to be mislead by the appearance of a device. They base their decisions on performance characteristics established through testing and experience.

SUMMARY AND CONCLUSIONS

The findings and opinions expressed in this reports are based upon the writer's education and training, his 43 years of professional experience in the highway industry, and his intimate knowledge of the subject of traffic control in highway work zones.

- The similarities between TrafFix Devices' WindBuster and the devices supplied by MDI, in particular the dual-spring feature, are based upon functional and other requirements imposed by major purchasers of these devices.
- The color orange is not unique to MDI's device. This color is mandated for many traffic control device components and is commonly used to denote work zones.
- The major purchasers of wind-resistant portable sign supports are sophisticated and knowledgeable agencies that are well acquainted with distinctions between the various devices available in the marketplace. There is little to no likelihood that similarities in names cause any confusion. To the contrary, the inclusion of the term "wind" within the name assists in identifying a device as being one of the several wind-resistant systems offered by various manufacturers.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff,

-vs-

TRAFFIX DEVICES, INC.,

Defendant.

Case No:
95-CV-40230

DEPONENT:	RONALD HARLOW LUNT (VIA TELEPHONE)
DATE:	March 5, 1997
TIME:	10:05 a.m.
LOCATION:	201 West Big Beaver Road, Suite 400 Troy, Michigan
REPORTER	Sandra Marchky, RMR, CSR 4803

Q. Did they contact you after that time?

A. They contacted me to talk about a second declaration.

Q. What exactly did they say to you during that conversation?

A. To the best of my recollection, he was talking about the fact -- because he had talked originally about coming out here and I believe someone from your office also to take my deposition in person. He informed me that they would not be doing that. I guess the court had ruled on the original suit and that now they were pursuing -- I believe it was something to do with style, they were still having -- MDI was still having some problems with the style of the pamphlets. That's to the best of my recollection.

Q. What specifically did they say about the second declaration that you would be preparing?

A. I don't recall specifically. It was something about they were continuing -- the first one, correct me if I'm wrong, was to do with name infringement, I think is what the first one was dealing with. The second one I believe was with the style.

Q. Did they say anything specific that was to

be included in the declaration?

A. No, not necessarily. I'm not sure I understand the question either.

Q. It's my understanding that from what you said, and correct me if I'm wrong, but they contacted you with regard to the preparation of a second declaration having to do with, as you put it, the style of the products?

MR. ARTZ: I'm going to object. I don't think that's what his testimony was.

A. I'm not sure we're talking about style of products or style of the advertisement for it. That was my understanding. And I could be wrong. As I said, I don't recall exactly.

Q. Who prepared your second declaration?

A. They faxed me -- and this is John Artz faxed me a copy of this or faxed this to me. There were some items in there that were vague. I made some corrections to it, just what I thought should read to be precise. I faxed it back to him and then he mailed this to me.

Q. When you say John Artz, you mean young John Artz?

A. Yes.

Q. How did they get the information that they

put into the declaration?

A. Through the phone conversations.

Q. So is everything in your second declaration something that you had told them in your phone conversations?

MR. ARTZ: Objection, vague indefinite. I don't understand the question.

Q. Let me say it a different way. Is there anything in your second declaration that you did not talk about in your conversations with MDI's attorneys?

A. No.

Q. To the best of your knowledge, could you describe exactly how the specifications for the Windbuster ended up on the bid sheet that's page 3 of Lunt Exhibit 3?

A. I don't know specifically. Repeat the question again. I was looking for the paper too.

Q. Okay. To the best of your knowledge, could you tell me how the Windbuster specifications ended up on the bid sheet which is page 3 of Lunt Exhibit 3?

A. I do not know how that got on there.

Q. Your second declaration provides some information about a specification in mid 1995. Just

one moment. The first paragraph 6 of your second declaration says that you prepared a specification to obtain a quote for sign stands and some roll-up signs and that you based the specification for the sign stands on two brochures you picked up somewhere.

Did you put the Windbuster specifications on the specification sheet or did somebody else?

MR. ARTZ: Hold on a second. I'm going to object. Which specification sheet are we talking about? He's testified that he prepared a specification sheet or a memo which was given to the purchasing department which ultimately prepared this. So you've got to be more clear. You are mixing the two up and it's going to be a messy record. With that understanding, let's try to be clear as to which specification we're talking about.

Q. I was talking about the specification sheet that you gave to the purchasing department.

A. The specification sheet that I gave to the purchasing department?

Q. Right. So it was you that put the specifications for Windbuster on that sheet -- or were there specifications for Windbuster on that sheet? Let me ask that question.

A. To the best of my recollection, the Windbuster was not mentioned in my written specifications sent to the purchasing department.

Q. Do you still have the written specification that you sent to the purchasing department?

A. No, I do not. It may be in my computer. I'm not sure. I was doing everything the way I'm doing now on the computer system. So it may or may not be in there.

Q. So to the best of your knowledge, you prepared a specification sheet with Windmaster specifications on it, is that correct, if we're talking about the specification referred to on your second declaration?

A. That is correct, to the best of my recollection.

Q. And then at some point the bid sheet included information relating to the Windbuster?

A. That's correct.

Q. Do you know where you got the brochures from that you mention in the first paragraph 6 of your second declaration?

MR. ARTZ: This has been asked and answered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.

Plaintiff,

v.

TRAFFIX DEVICES, INC.

Defendant.

Civil Action No. 95-CV-40230
Honorable Paul V. Gadola

DECLARATION OF WILLIAM GOTTSCHALK

William Gottschalk, being duly sworn, do states:

1. I am a law clerk employed by Reising, Ethington, Barnard & Perry, PLLC.

2. On Monday morning, March 10, 1997, I was asked by Jeanne-Marie Marshall to take pictures of the sign stands in use at a construction site located on north bound Telegraph between I-696 and 10 Mile Road.

3. As requested, I drove to the construction site and took photographs of two of the sign stands, one located at the northwest corner of 10 Mile Road and Telegraph and another on the same side of the road immediately north and adjacent to the Giffels parking lot.

4. These two sign stands were representative of the portable sign stands in use at the construction site, including the use of a donut shaped weight as ballast.

5. Each of the two sign utilized roll-up signs; one was a 45 MPH sign and another was a graphical representation that the right lane ended ahead. Both sign stands utilized a donut shaped weight positioned about the vertical upright and resting upon the legs of the stand. Both sign stands had stickers indicating the manufacturer as "USA SIGN" and included the designation "WIND-deflectable".

6. I have attached as Exhibit 1 several of the photographs that I took of the sign stands on March 10, 1997. These photographs are an accurate representation of the portable sign stands in use at the construction site

8. I am competent to testify on the above matters, and the above information is true to the best of my knowledge.

/s/ William Gottschalk

William Gottschalk

Date: 3/28/97

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

ROBERT SARKISIAN,

Plaintiff,

vs.

WINN-PROOF CORPORATION,
WILLIAM A. WERNER, and
WER-NEL ENTERPRISES, INC.,

Defendants.

Civil No. 75-1131

DEPOSITION OF ROBERT SARKISIAN

September 30, 1976

[Pages 2-6 omitted]

A. Yes.

Q. Did you have an ongoing sign stand or display business of your own before you incorporated Marketing Displays?

A. No.

Q. You went directly from Arlington Aluminum Company to formation of your own company, Marketing Displays?

A. Yes.

Q. I believe in the Answers to Interrogatories you have indicated Marketing Displays is furnishing some of the backing for this litigation. What percentage of the litigation expenses are they providing?

A. All.

Q. Did the company that you formerly worked for, Arlington Aluminum Company, did they manufacture sign stands which in any way would move with the wind or would deflect with the wind?

A. No.

Q. They made only stationary sign stands?

A. Well, they didn't have a product as such.

Q. You said they made display----

A. Yes.

Q. -- devices. What kind of display devices did they have?

A. Racks to hold merchandise, poster frames, tripod easels, literature racks.

Q. Were any of those poster frames designed for outside use?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OREGON
SOUTHERN DIVISION

MARKETING DISPLAYS, INC.,

Plaintiff(s),

-vs-

TRAFFIX DEVICES, INC.,

Defendant(s).

No. 95-CV-40230

DEPONENT:	ROBERT SARKISIAN
DATE:	September 27, 1996
TIME:	9:55 a.m.
LOCATION:	1000 Town Center, 22nd Floor Southfield, Michigan
REPORTER:	Robert F. Grittini

[Pages 2-76 omitted]

A. No.

Q. Do you know why not?

A. Our focus at that time was on the infringement of our patents.

Q. Have you sued anyone else for trademark infringement besides TrafFix Devices and Eastern Metals?

A. And yourself.

Q. How about have you sued anyone else for trade dress infringment besides Eastern Metals and TrafFix Devices?

A. And yourselves.

Q. That's TrafFix Devices.

A. Oh, I'm sorry. No, I don't know.

Q. Are you aware of anyone else in the marketplace presently utilizing a dual spring design?

A. There's another company, I forgot their name, that does have the dual spring design.

Q. Would that be Bone Safety?

A. Could be.

Q. Do you object to their dual spring design?

A. I do.

Q. Why?

A. Because it emulates the look of WindMaster.

Q. Besides Bone Safety, Eastern Metals and TrafFix, do you know of anyone else utilizing the dual spring design in relation to a traffic sign stand?

A. No.

Q. You stated that you objected to the appearance of the Bone Safety sign stand. Have you instituted a lawsuit against Bone Safety?

A. Not at this juncture.

Q. Are you contemplating filing a lawsuit against Bone Safety?

MR. J.A. ARTZ: Objection, that's privileged. You don't have to answer that question.

MS. MARSHALL: Whether or not Mr. Sarkisian is contemplating filing a lawsuit is not privileged. Any conversations he has had with you about whether to file a lawsuit certainly would be privileged. But I disagree whether his own personal thoughts on the matter, they have nothing to do with communications.

MR. J.A. ARTZ: His personal knowledge would not be filing a lawsuit. If a lawsuit is going to be filed, it's going to be filed on behalf of the company, so therefore, he's answering on behalf of the company relative to that question and it's privileged

and I instruct him not to answer.

MS. MARSHALL: The company's thoughts on whether or not to file a lawsuit aren't privileged. Company acts through individuals and an individual makes a determination. Any conversations with you is communications between counsel and the client that are privileged.

M. J.A. ARTZ: There's no sense debating this, Miss Marshall, he's not going to answer the question because it's all privileged. Anything that they have relative to what to do with Bone Safety has been on advice of counsel, so therefore, anything he may answer would be based on the advice of counsel and necessarily include the advice of counsel, therefore, he should not answer the question.

A. I would agree with that. I'll support you on that.

MR. J.A. ARTZ: Thank you.

Q. (By Ms. Marshall:) Let me ask you this: Have you consulted counsel regarding this situation with Bone Safety?

MR. J.A. ARTZ: Go ahead.

A. We have talked to counsel about that, yes.

Q. (By Ms. Marshall:) And can you tell me when

those conversations took place?

A. Not precisely.

Q. Can you give me an approximate time frame?

A. Within the last year.

Q When did you become aware of the sign stand being marketed by Bone Safety?

A. I don't remember.

Q. Have you had any communications with anyone at Bone Safety regarding your objections to the appearance of their sign stand?

A. I don't know. I personally have not, but I don't know if the company has.

Q. Who would know whether or not the company had had any communications with Bone Safety?

A. I would guess the product manager, John Sarkisian.

Q. And do you know whether there have been any written communications with Bone Safety --

A. No.

Q. -- regarding --

A. I don't know.

Q. Would that also be John Sarkisian?

A. It probably would be, yes.

Q. If there were any communications with Bone Safety in writing, where would those be located?

A. I don't know.

Q. Would those be kept in the files at MDI?

A. Probably.

Q. If your attorney has done any communicating with Bone Safety on your behalf, would you have copies of those letters in your file?

A. Probably. I don't know.

MR. J.A. ARTZ: Your file, you're talking about MDI and not him personally, you're talking about MDI?

Q. (By Ms. Marshall:) Let's break it down. Would you have any records at MDI that your attorney have sent you at MDI a copy of?

A. I don't know. I don't know.

Q. And the attorney didn't send you anything personally?

A. No. Yes, he did not.

Q. Do you know what happened to Winn-Proof Corporation?

A. No.

Q. Do you know if they're still in business?

A. Pardon me?

Q. Do you know if they're still in business?

A. I don't think so.

Q. Do you know when they went out of business?

JOINT APPENDIX VOL. 2 Unavailable for Filming at this Time